Nos. 10-1687, 10-2442

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD VANCE, ET AL.,

Plaintiffs-Appellees,

v.

DONALD RUMSFELD and THE UNITED STATES OF AMERICA,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, HON. WAYNE R. ANDERSEN

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JURISDICTIONAL STATEMENT

Plaintiffs brought this action against defendant Donald Rumsfeld under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States under the Administrative Procedure Act, 5 U.S.C. § 702. Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331.

The district court issued a decision denying defendant Rumsfeld's motion to dismiss in part on the basis of qualified immunity on March 5, 2010. Rumsfeld filed a timely notice of appeal on March 19, 2010. This Court has jurisdiction over Secretary Rumsfeld's interlocutory appeal pursuant to 28 U.S.C. § 1291. *See Behrens v. Pelletier*, 516 U.S. 299, 301, 312-13 (1996); *Levan v. George*, 604 F.3d 366, 369-70 (7th Cir. 2010).

The district court denied the United States' motion to dismiss on July 29, 2009, and certified that order for interlocutory appeal under 28 U.S.C. § 1292(b) on May 26, 2010. This court granted the United States' timely motion for permission to take an interlocutory appeal on June 15, 2010. This Court has jurisdiction over the United States' appeal under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

1. Whether it is legal error for a court to create a *Bivens* remedy for damages against former Secretary of Defense Donald Rumsfeld for allegedly establishing policies governing the detention and interrogation of detainees in a foreign war zone.

2. Whether former Secretary of Defense Rumsfeld is entitled to qualified immunity on plaintiffs' claim that Rumsfeld established policies under which plaintiffs were subjected to allegedly abusive conditions of confinement.

3. Whether the "military authority" exception in the Administrative Procedure Act (APA), which prohibits judicial review of "military authority exercised in the field in time of war or in occupied territory," 5 U..S.C. § 701(b)(1)(G), precludes subject-matter jurisdiction over plaintiffs' APA claim for the return of property seized by the United States military in Iraq during wartime.

STATEMENT OF THE CASE

Case No. 10-1687 is an interlocutory appeal from the district court's order denying qualified immunity to former Secretary of Defense Donald Rumsfeld, and rejecting Secretary Rumsfeld's argument that the court should not create a claim under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the alleged violation of plaintiffs' constitutional rights in conjunction with their detention by U.S. military personnel while working as civilian contractors in Iraq. Plaintiffs allege, among other things, that former Secretary Rumsfeld was responsible for promulgating policies that led to plaintiffs being subjected to abusive interrogation techniques and conditions of confinement, in violation of their constitutional rights.

The district court dismissed two of plaintiffs' claims against Secretary Rumsfeld, but denied Secretary Rumsfeld's motion to dismiss plaintiffs' claim that their treatment while in U.S. custody violated their substantive due process rights.

The court rejected Secretary Rumsfeld's argument that special factors preclude the creation of a *Bivens* remedy in the context of military judgments in a war zone. The court also found the allegations in the complaint sufficient to allege Secretary Rumsfeld's personal involvement in the alleged constitutional violations and to state a claim for violation of plaintiffs' substantive due process rights under the Fifth Amendment. The court further held that Secretary Rumsfeld is not entitled to qualified immunity.

In addition to asserting claims against Secretary Rumsfeld, plaintiffs' complaint asserted a claim against the United States under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, seeking the return of personal property allegedly seized by U.S. military personnel when plaintiffs were initially detained. In a separate order, the district court denied the government's motion to dismiss that claim. The court rejected the government's argument that the claim is barred by the "military authority" exception to the APA, which precludes judicial review of "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G). The district court subsequently certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and this Court granted the United States' request to take an interlocutory appeal.

STATEMENT OF THE FACTS

A. Plaintiffs' Arrest and Allegations of Harsh Treatment.

Plaintiffs, Donald Vance and Nathan Ertel, are two United States citizens who were working in Baghdad's "Red Zone" in the latter part of 2005, as civilian contractors for a privately-owned Iraqi security services company, Shield Group Security ("SGS"). App. 77-79. Plaintiffs allege that, during the course of their employment, they became suspicious that SGS officials and persons associated with them were involved in massive illegal arms trading, stockpiling of weapons, kickback schemes, bribery, fraudulent contract procurement, and suspicious meetings with government officials. App. 80-90.

According to the complaint, Vance relayed his suspicions to an agent of the Federal Bureau of Investigation during a visit to Chicago, and agreed to continue to report any suspicions. App. 80. The agent put Vance in touch with several government officials in Iraq, and Vance and Ertel continued to provide information to them. Plaintiffs claim that, at some point, officials at SGS began to doubt plaintiffs' loyalty to the company. App. 80-81. On April 14, 2006, armed SGS agents allegedly confiscated plaintiffs' access cards which permitted them freedom of movement into the "Green Zone" and United States compounds. This action effectively trapped plaintiffs in the "Red Zone" and within the SGS compound. App. 92-93, ¶¶ 117-19.

Plaintiffs described this situation as being held "hostage," and claim that their government contacts instructed them to arm themselves and barricade themselves in a room in the SGS compound until United States forces could "rescue" them. App. 94, ¶¶ 124. They allege that United States military forces then came to the SGS compound to "rescue" them. *Id*. ¶ 125.

At that time, U.S. military personnel allegedly seized plaintiffs' property, which plaintiffs claim include "their personal laptop computers, Mr. Ertel's cell phone and Mr. Vance's digital and video cameras, as well as the associated data contained in these items." App. 94, ¶ 127. In addition, "one or more large weapons caches" were discovered on SGS' premises. App. 155.

Plaintiffs were initially taken to the United States Embassy. App. 94, ¶128. Plaintiffs subsequently were detained on suspicion of "supplying weapons and explosives to insurgent/criminal groups through [their] affiliation with [SGS]" and receiving stolen weapons and arms from coalition forces. App. 96-97, 149-55. Plaintiffs allege that these charges were fabricated and that, in reality, unknown government officials caused their "arrest" in retaliation for plaintiffs' "whistleblowing" activity. App. 95-96, ¶¶ 132-37.

Plaintiffs were sent to Camp Prosperity immediately after their "arrest," where they remained for approximately two days. App. 97-98, ¶¶ 140-43. Plaintiffs assert

that they were threatened with "excessive force" upon their arrival, and that during their short stay, they were held in solitary confinement and that the lights in their cells were kept on at all times. App. 97, ¶¶ 142.

Plaintiffs were then taken to Camp Cropper, a military facility near Baghdad International Airport. *Id*. ¶ 144. Plaintiffs allege that they were held in solitary confinement, housed in tiny and unclean cells, and "mostly deprived of stimuli and reading material." *Id*. ¶ 146. They allege that "[t]he cells were kept extremely cold, and the lights were always turned on, except when the electric generators at the camp would fail." *Id*. ¶ 147. They further allege that they were "purposefully deprived of sleep" that the cells were filled with loud heavy metal or country music, and that "[g]uards would pound on the cell doors" when they observed plaintiffs sleeping. App. 99, ¶ 149. Plaintiffs also complain that the drinking water was "often withheld," and that they "often were denied food and water completely, sometimes for an entire day." *Id*. ¶ 151.

Plaintiffs further complain of inadequate shoes and lack of access to necessary medical care. App. 99-100, ¶¶ 152-54. They allege, for instance, that delays in treating Vance's tooth problem resulted in having the tooth extracted, and that guards confiscated antibiotics and pain killers prescribed by the dentist, leading to an infection. *Id*. ¶¶ 153-54. They further allege that antacids to alleviate Ertel's ulcer

were "often withheld from him." App. 100, ¶155. Plaintiffs also allege that guards would conduct sham "shake downs" of their cells "apparently to keep them off-balance mentally." *Id*. ¶ 156.

The complaint also alleges that the guards at Camp Cropper "physically threatened and assaulted Plaintiffs" by, for example, purposefully steering them into walls when they were being transported while blindfolded. *Id*. ¶ 157. Plaintiffs also state that they "were constantly threatened that guards would use 'excessive force' against them if they did not immediately and correctly comply with every instruction given them." *Id*. ¶ 158. Plaintiffs alleged that they were "continuously interrogated by military and civilian United States officials" while at Camp Cropper, and that their requests for an attorney were denied. App. 149-53, ¶ 165-66.

Ten days after plaintiffs' arrival at Camp Cropper, a military detainee status review board was convened to determine whether plaintiffs should be detained as security internees. App. 104, 149-53. That board ultimately recommended Ertel's immediate release as an "innocent civilian" and recommended Vance's continued detention as a security detainee. App. 111. Ertel was released approximately six weeks after his initial detention. App. 111-12. After additional investigation, on July 20, 2006, the military also released Vance, whose detention lasted approximately three months. App. 112.

Plaintiffs subsequently requested the return of the property seized at the time they were taken into custody. Military personnel stationed in Iraq conducted an extensive search for plaintiffs' property, resulting in the return of Vance's laptop computer, but could not locate any additional property. App. 156-59.

B. The Complaint Against Former Secretary Rumsfeld.

Plaintiffs brought this action against former Secretary of Defense Rumsfeld (in his individual capacity) and numerous unidentified defendants, alleging myriad constitutional violations. In regard to Rumsfeld, the complaint asserted three counts: a claim (apparently based on substantive due process) for "dictating torture, cruel, inhuman and degrading treatment" (Count I); a procedural due process claim based on the denial of various procedural rights (Count II); and a claim for denial of access to courts and counsel (Count III). App. 125-33. The district court dismissed counts II and III, and those counts are not at issue in this appeal.

In Count I, plaintiffs characterize their treatment as "torturous, cruel, [and] inhuman," asserting that it included "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations, and other psychologically-disruptive and injurious

techniques." App. 125-26, ¶ 259. Plaintiffs allege that this treatment "was intentionally used on Plaintiffs for its perceived value as an interrogation tactic." App. 126, ¶ 261. They also allege that many persons detained at Camp Cropper "were treated far better and more humanely." *Id*. ¶ 260.

According to plaintiffs, their alleged treatment was the result of "policies and practices" initiated by then-Secretary Rumsfeld. *Id*. ¶ 262. Plaintiffs cited two instances in which Secretary Rumsfeld authorized the use of certain interrogation techniques for detainees at Guantanamo Bay, Cuba, rather than at Camp Cropper. App. 118-19, ¶¶232, 234. They acknowledged, however, that even those authorizations were rescinded *before* their detention. *See id*. ¶ 233.

Plaintiffs also alleged that Secretary Rumsfeld sent Major Geoffrey Miller to Iraq in August 2003 to "Gitmo-ize" Camp Cropper, and by doing so "tacitly" authorized the use of harsh interrogation techniques. App. 119, ¶¶ 236-37. Plaintiffs also cited a memorandum signed in September 2003 by Lieutenant General Ricardo Sanchez, Commander of the Coalition Joint Task Force, authorizing the use of interrogation techniques such as "yelling, loud music, light control, and sensory deprivation." App. 119-20, ¶ 238. According to plaintiffs, General Sanchez modified the order one month later, but "continued to allow interrogators to control the lighting, hearing, food, shelter and clothing given to detainees." App. 120, ¶ 239.

As the complaint acknowledged, all of the policy directives, even assuming *arguendo* they applied to U.S. citizens in Iraq, were superseded by the Detainee Treatment Act (DTA), Pub. L. No. 109-148, enacted on December 30, 2005 (prior to plaintiffs' detention). App. 121, ¶ 242. The DTA provided that no person in Department of Defense ("DoD") custody could be subject to any treatment or interrogation technique that is not authorized in the Army Field Manual. *Ibid*. According to plaintiffs, the Army Field Manual on Intelligence Interrogation "limited the allowable techniques to those consistent with international norms which forbid cruel, inhuman and degrading treatment." *Id*. ¶ 243. Plaintiffs allege, however, that on the same day Congress enacted the DTA, Secretary Rumsfeld secretly added "ten pages of classified interrogation techniques" to the Manual that "apparently authorized, condoned, and directed the very sort of violations that Plaintiffs suffered." App. 121-22, ¶ 244. The complaint states that, "[t]o the best of plaintiffs' knowledge, the December Field Manual was in operation during their detention." App. 122.

Finally, the complaint states that, "alternatively," Secretary Rumsfeld "reserved the use of the harsher interrogation techniques to his prior, case specific approval." App. 127, ¶ 267. Plaintiffs "therefore infer that Defendant Rumsfeld specifically authorized some or all" of their mistreatment. *Ibid*. In addition, on the basis of alleged policies requiring the prior approval of Secretary Rumsfeld prior to releasing

a detainee, plaintiffs "infer" that Secretary Rumsfeld had "actual knowledge that they were being detained and mistreated" and "failed to intervene sooner to terminate this mistreatment." *Ibid*.

Plaintiffs sought judgment against Secretary Rumsfeld for unspecified "actual and punitive damages," as well as costs and fees and "any and all other relief to which they may appear entitled." App. 127.

C. The Complaint Against The United States.

Plaintiffs' amended complaint also included a claim against the United States under the APA, seeking return of the laptops and other material taken while they were placed in custody. Plaintiffs allege that they "have tried to secure the return of their property . . . by petitioning the United States Army . . . and by working with the United States Department of Justice." App. 147, ¶ 383. They claim that, with the exception of Vance's laptop (which had been returned), the Army "refused to produce" any of their property and the Department of Justice ("DOJ") has said "that the government does not intend to return any other property." *Id*. ¶¶ 383-84. Characterizing the Army's "ruling" and DOJ's "statement" concerning their property as "final agency actions" that were arbitrary and capricious, plaintiffs asked the court to order "the return of all of [their] personal property including computers, other electronics, and the data included therein." App. 147-48.

D. The District Court's Decision on Secretary Rumsfeld's Motion to Dismiss.

Secretary Rumsfeld moved to dismiss the three counts against him, arguing: (1) that "special factors" preclude recognizing a *Bivens* action for policies involving the detention and interrogation of detainees in a foreign war zone; and (2) that Secretary Rumsfeld is entitled to qualified immunity because plaintiffs had not sufficiently alleged his personal involvement in the alleged constitutional violations, and had not sufficiently alleged the violation of clearly established constitutional rights. The district court granted the motion in part and denied it in part. The court dismissed count II (procedural due process) and count III (denial of access to the Courts). App. 34-39. However, the court denied the motion to dismiss Count I, the substantive due process count.

The court held that special factors do not preclude the creation of a *Bivens* remedy. The court rejected the contention that the political branches, and not the courts, should determine whether the creation of a money damage remedy is warranted in the context of military judgments in a war zone. The court based this conclusion on two considerations it deemed "important" to the special factors analysis.

First, the district court observed that Count I of the complaint "requires us only to determine whether the judiciary may properly provide a *post hoc* remedy to American citizens who allege that, during a period of war, they were tortured." App. 29. Accordingly, the court reasoned, Count I "does not require this court to govern the armed forces" and does not "require that we challenge the desirability of military control over core warmaking powers." App. 30.

Second, the district court found "important" the "American citizenship of plaintiffs Vance and Ertel." App. 31. The court therefore distinguished cases refusing to recognize a *Bivens* remedy to challenge wartime interrogation or detention policies, characterizing those cases as "directed at the prospect of a judicial remedy by non-citizens engaged in battle against the United States." App. 31-32.

The court also found the allegations in the complaint sufficient to allege Secretary Rumsfeld's personal involvement in the plaintiffs' alleged injuries. The court observed that "plaintiffs' complaint against Rumsfeld at this stage can proceed only if it properly alleges that Rumsfeld created a policy that expressly authorized those under his command to carry out a constitutional violation." App. 9. The court then cited "a number of key dates and facts" that it said supported plaintiffs' allegations of Secretary Rumsfeld's personal involvement. These included the superseded Guantanamo policies, the policy issued by General Sanchez, and the

allegation that Secretary Rumsfeld had added "ten pages of classified interrogation techniques" to the Army Field Manual. App. 9-11. The court then held that, although plaintiffs' allegations of Secretary Rumsfeld's "supposed knowledge of cruel and inhumane treatment of detainees in Iraq" is insufficient to demonstrate his personal involvement, these allegations "give some support to the core assertion regarding Rumsfeld's role as the architect of the detainee treatment methods at issue in this case." App. 11.

The court also held that Secretary Rumsfeld is not entitled to qualified immunity, concluding that "the allegations set forth by plaintiffs are comprehensive enough to merit an invocation of the line of cases assessing torture in a constitutional light." App. 17. The court held that, accepting the fact that the treatment methods alleged by plaintiffs were in fact used, a court "might plausibly determine" that the conditions were torturous. *Id*. Even if some of the alleged conduct may not shock the conscience, the court held, "plaintiffs have set forth the cumulative allegations necessary to state a claim of mistreatment." App. 17-18.

The court also held that the right of a citizen to the protection of the due process clause, even in a foreign war zone, was well established. App. 21-22. The court then concluded that a reasonable person in Secretary Rumsfeld's position would

know "that the application of torturous treatment methods against American civilians in Iraq might give rise to a constitutional violation." App. 24-25.

E. The District Court's Decision on the United States' Motion to Dismiss.

In a separate motion, the United States moved to dismiss the APA claim, asserting, among other things, that the action was barred by 5 U.S.C. § 701(b)(1)(G). That provision states that an "agency" subject to suit does not include "military authority exercised in the field in time of war or in occupied territory." The district court denied the motion, concluding that "the record does not contain sufficient facts to demonstrate whether the military authority exception applies * * *." App. 46. Characterizing the issue as "fact intensive," the court declared that the statute does not "exempt the military as a whole or exempt all wartime military activities unrelated to armed conflict." App. 45. The district court reasoned that the "in the field" requirement may not be met because "[p]laintiffs have not challenged the seizure of their property, but rather the United States' decision not to return it when asked to do so." *Id*. The decision not to return property, the court held, "is not inherently an exercise of authority from the field of battle." *Id*. The court then stated that "further discovery is needed to sort out the details" of the location of the property. *Id.*

The district court also stated that "it is not clear (and there are no facts in the record) that a commander in the field is causing the refusal to return Plaintiffs' property, another fact specific question that the courts have found to be determinative." App. 45. Finally, the court reasoned that "there is no evidence to suggest where Plaintiffs' property is and whether some or all of Plaintiffs' property is outside the military's possession." App. 46. The court held that "if discovery demonstrates that Plaintiffs' property has been transferred to a non-military agency or is no longer in the field, then the APA's 'military authority' exception would not apply." *Id*.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision denying a motion to dismiss on the basis of qualified immunity. *Alvarado v. Litshcer*, 267 F.3d 648, 651 (7th Cir. 2001). The question whether special factors preclude a *Bivens* claim also is subject to *de novo* review. *See Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009). The question whether the action against the United States is precluded by the APA's "military authority" exception is a question of law subject to *de novo* review. *See Thomas v. GMAC*, 288 F.3d 305, 307 (7th Cir. 2002).

SUMMARY OF THE ARGUMENT

This case does not concern the propriety of torture. In fact, torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. *See* 18 U.S.C. § 2340A. Rather, this case concerns the question whether the courts should create a cause of action for monetary damages against the former Secretary of Defense, and whether the complaint adequately alleges that Secretary Rumsfeld should be held personally liable for plaintiffs' alleged treatment.

1. A dispositive threshold issue supports dismissal of the *Bivens* claims asserted against Secretary Rumsfeld here. The Supreme Court and the courts of appeals have consistently refused to extend *Bivens* remedies to new contexts. Where there are special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage action if it so chooses. That course is clearly appropriate here.

The district court held that it is appropriate to create a common-law damage action in the context of the detention and treatment of citizens by the United States military in a foreign war zone. However, the context of this case presents compelling

"special factors" that strongly counsel against judicial creation of a money-damage remedy. Courts consistently hold that is not appropriate for the judiciary to create a *Bivens* common-law damage remedy where claims directly implicate matters of armed conflict or national security. There can be little question that the claims here directly implicate military authority and national security. Plaintiffs' claim stems from their detention in a foreign war zone, and involves an explicit challenge to alleged detention and interrogation policies issued by the Secretary of Defense. As a result, their claim cannot proceed without inquiry into the military's detention and interrogation policies that applied in an active foreign war zone. Given this highly sensitive context, the district court erred in recognizing a damage action, absent congressional authorization.

The district court's reasoning that it may hear evidence and then decide which detention practices are sufficiently related to military needs would require precisely the sort of judicial second-guessing the Supreme Court has held inappropriate. Nor does plaintiffs' citizenship alter the analysis. While citizens detained abroad may have certain constitutional rights that aliens detained abroad do not, that does not negate the fact that a challenge to military detention policies in a war zone would enmesh the judiciary in military and national security matters, interfering with Executive functioning and legislative prerogatives.

2. Even if special factors did not preclude a *Bivens* action here, the district court should have dismissed the case because Secretary Rumsfeld is entitled to qualified immunity. First, the complaint does not sufficiently allege that Secretary Rumsfeld was personally involved in the alleged constitutional violation. The only concrete allegations of detention and interrogation policies in the complaint concern policies that by their terms did not apply to U.S. citizen detainees in Iraq, and in any event that were, by plaintiffs' own admission, rescinded before plaintiffs were detained. And plaintiffs' allegation that Secretary Rumsfeld secretly added ten pages of classified techniques to the Army Field Manual is both speculative and implausible. Plaintiffs' claim against Secretary Rumsfeld rests upon precisely the sort of "naked assertion[s]" of illegal conduct without any factual enhancement, that are insufficient to state a claim for personal liability against a government official. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009).

Second, the allegations of the complaint are too vague and conclusory to support a claim that Secretary Rumsfeld violated plaintiffs' clearly established rights. Despite the fact that plaintiffs amended their complaint twice, the complaint contains little more than vague, cursory, and conclusory references to plaintiffs' conditions of confinement, without sufficient factual information from which to evaluate their constitutional claim, let alone to conclude that a Cabinet-rank official violated their

clearly established constitutional rights. Plaintiffs' generalized and conclusory allegations therefore do not provide sufficient information about the alleged conduct for the court to apply the murky and fact-based "shocks the conscience" standard.

3. The district court also erred in refusing to dismiss plaintiffs' APA claim against the United States. The APA explicitly excludes from judicial review acts of "military authority exercised in the field in time of war or in occupied territory." *See* 5 U.S.C. § 701(b)(1)(G). A simple application of the plain language of the statute is enough to dispose of plaintiffs' APA claim. Plaintiffs challenge actions taken by "military authority" (U.S. personnel who rescued plaintiffs and investigated the suspected arms smuggling). That action occurred "in the field" (in Iraq) and took place "in time of war" (pursuant to congressional authorization for the use of military force).

The district court's conclusion that a claim for the *return* of property (as opposed to its seizure) is not covered by the military authority exception is incorrect. Plaintiffs here seek an inquiry into whether the military personnel who seized the property have lost, misplaced, or improperly transferred it. That would involve extensive discovery and judicial inquiry into military actions taken in a war zone during time of war – precisely the sort of inquiry the exception was designed to prevent. Moreover, the district court offered no principled basis for determining

precisely at what point a "seizure" of property ends and a claim for "return" begins, nor did it explain how that determination can be made without inquiring into military decision-making during a time of war. In sum, the district court's artificial distinction between the seizure of property and the failure to return it is flatly inconsistent with the plain language of the statute.

ARGUMENT

I. A *BIVENS* ACTION SHOULD NOT BE CREATED IN THIS CONTEXT, WHICH DIRECTLY IMPLICATES MATTERS OF NATIONAL SECURITY AND WAR POWERS.

1. In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 129 S. Ct. at 1947. The *Bivens* Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common law action, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Subsequent to *Bivens*, the Supreme Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). Indeed, in "the 38 years

since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson* [*v. Green*, 446 U.S. 14 (1980)]." *Arar v. Ashcroft*, 585 F.3d 559, 574-75 (2d Cir.2009) (en banc), *cert. denied*, 2010 WL 390397 (2010).

Because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," it must be undertaken, if at all, with great caution. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-70 (2001); *see Iqbal*, 129 S. Ct. at 1948 ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants'") (quoting *Malesko*, 534 U.S. at 66). In *Malesko*, the Supreme Court explained that, in *Bivens*, the Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes," decisions from which the Court has since "retreated" and that reflect an understanding of private rights of action that the Court has since "abandoned." 534 U.S. at 67 & n.3. As the Fourth Circuit has observed, "[t]he Court's repeated reluctance to extend *Bivens* is not without good reason. A *Bivens* cause of action is implied without any express congressional authority whatsoever." *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006).

Moreover, "[t]he Supreme Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id*. at 289-90 (citation omitted). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Id*. at 290 (internal quotation marks omitted). The Eighth Circuit has described the Supreme Court's recent decisions in this area as erecting a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees." *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (internal quotation marks omitted).

The lack of an alternative damages remedy does not answer the question of whether the court should create a *Bivens* action here. The Supreme Court made clear that, even in the absence of an "alternative, existing process," courts still must make an assessment "appropriate for a common-law tribunal" and should "pay[] particular heed * * * to any special factors counseling hesitation." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *see also United States v. Stanley*, 483 U.S. 669, 683 (1987) ("it is irrelevant to a special factors analysis whether the laws currently on the books afford Stanley * * * an adequate federal remedy for his injuries").

2. The context presented by the claims here – implicating military and national security matters – clearly counsels against the recognition of a *Bivens* action. Plaintiffs' claim stems from their detention in a foreign war zone, and involves an explicit challenge to alleged detention and interrogation policies issued by the Secretary of Defense.

Even outside the context of implied *Bivens* actions, courts generally recognize that "[m]atters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981); *see also Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"); *Alhassan v. Hagee*, 424 F.3d 518, 525 (7th Cir. 2005) ("judges are not military leaders and do not have the expertise nor the mandate to govern the armed forces"); *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004) ("the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends

and which belong to its enemies"); *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) ("It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role"); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir.1997) (court cannot adjudicate claims brought by Turkish sailors alleging injuries and wrongful death suffered as a result of missiles fired by a United States Navy vessel during North Atlantic Treaty Organization training exercises); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (refusing to adjudicate claim that bombing of Cambodia during the Vietnam conflict required separate Congressional authorization); *Da Costa v. Laird*, 448 F.2d 1368 (2d Cir. 1971) (court was not competent to judge significance of mining and bombing of North Vietnam's harbors and territories for purposes of determining whether Congressional authorization was required).

In some exceptional instances, the courts are required, by constitutional necessity or by a clear grant of authority by Congress, to adjudicate matters directly pertaining to war and national security. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The general rule, however, is that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v.*

Egan, 484 U.S. 518, 530 (1988). Refusal to adjudicate a claim directly implicating matters of war and national security, however, "does not leave the executive power unbounded." *Schneider v Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005). While the aggrieved party may have no remedy for damages, "the nation has recompense, and the checks and balances of the Constitution have not failed * * *. If the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Ibid.*

Given this well-established general rule, and given the strong presumption against extending *Bivens* actions to new and sensitive contexts, it is hardly surprising that courts have been particularly careful not to intrude upon quintessential sovereign prerogatives by creating a *Bivens* remedy in contexts directly implicating armed conflict or national security. Where a money-damage claim directly implicates military matters, especially those involving sensitive executive decision making, the courts have consistently recognized that it is generally not an appropriate area for creating a federal common law *Bivens* damage remedy. *Stanley*, 483 U.S. at 683-84 ("The special factor that counsels hesitation is * * * the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."); *Chappell v. Wallace*, 462 U.S. 296, 301-304 (1983) (declining to imply *Bivens* remedy against military officers by enlisted personnel because, in part, the federal constitution vests

principal responsibility for military matters in Congress and the President); *Arar*, 585 F.3d 559 at 574-75 (declining to extend *Bivens* cause of action in the context of a national security removal because "such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation"); *Rasul v. Meyers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (holding that "[t]he danger of obstructing U.S. national security policy" is a factor counseling hesitation"), *cert. denied,* 130 S. Ct. 1013 (2009); *Libby*, 535 F.3d at 710 ("if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994) ("The unreviewability of the security clearance decision is a 'special factor counseling hesitation,' which precludes our recognizing a *Bivens* claim"); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (refusing to recognize a *Bivens* action against "military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad").

The judicial reluctance to create claims for money damages applies with full force here. Plaintiffs were detained by the U.S. military in a foreign war zone on suspicion of supplying arms to the enemy. The complaint explicitly challenges purported detention and interrogation policies issued by the Secretary of Defense.

App. 118-22. As a result, their claim cannot proceed without inquiry into the military's detention and interrogation policies that applied in an active foreign war zone, "the perceived need for the policy, the threats to which it responds, the substance and sources of intelligence used to formulate it, and the propriety of adopting specific responses to particular threats * * *." *Arar*, 585 F.3d at 575.

In addition, the D.C. Circuit has emphasized that where litigation of a claim "would inevitably require inquiry into 'classified information,'" that fact provides "further support" against creating a Bivens remedy. *Libby*, 535 F.3d at 710-11. Here, plaintiffs rest their claim upon an allegation that Secretary Rumsfeld secretly added "ten pages of classified interrogation techniques" to the Army Field Manual. App. 121-22, ¶ 244.[1] Litigating such a claim thus "would inevitably require judicial intrusion into matters of national security" by permitting plaintiffs to conduct discovery concerning the claimed existence of classified information, and that by itself counsels against creating a *Bivens* remedy. *Libby*, 535 F.3d at 711; *cf. Arar*, 585 F.3d at 576.

In light of the concerns discussed above, it is not surprising that numerous courts have held that challenges to military detention policies implicate core

[1] As we note below (p. 45, *infra*), there is no basis for plaintiffs' speculative and conclusory allegation. In actuality, no part of the Army Field Manual is classified.

warmaking powers and national security functions, and thus that permitting a *Bivens* action in this context is inappropriate. *See, e.g., Rasul*, 563 F.3d at 532 n.5; *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111-12 (D.D.C. 2010); *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 94 (D.D.C. 2007), *appeal docketed sub nom. Ali v. Rumsfeld*, No. 07-5178 (D.C. Cir. May 31, 2007). Each of these cases involved claims that Secretary Rumsfeld should be held personally liable for establishing detention and interrogation policies and that Secretary Rumsfeld failed to prevent or stop alleged abuses. *See, e.g.,In re Iraq*, 479 F. Supp. 2d at 91 & n.5; *Al-Zahrani*, 684 F. Supp. 2d at 106-07. Plaintiffs make the same claims in this case. *See* App. 118-23. Like the claims of the plaintiffs in *Rasul, In re Iraq* and *al-Zahrani*, special factors foreclose a *Bivens* action here.

Munaf v. Geren, 128 S. Ct. 2207 (2008), is also instructive. In that case the Supreme Court considered habeas petitions filed by two United States citizens detained by Multinational forces in Iraq, seeking to enjoin their transfer to the Iraqi government for criminal prosecution. Even though Congress had authorized habeas petitions, the Court unanimously denied the petitions in that case because the requested relief "would implicate not only concerns about interfering with a sovereign's recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders, but also concerns about unwarranted judicial

intrusion into the Executive's ability to conduct military operations abroad." *Id*. at 2224. If concerns about intruding into military operations were sufficient to lead the Court to deny a habeas remedy to United States citizens currently detained in Iraq in a case over which it had statutory jurisdiction, those concerns certainly counsel against creating a non-statutory damages remedy for individuals previously detained in Iraq.

If Congress wishes to provide a damage remedy in this very sensitive setting, it could do so. But instead, Congress has carefully considered these issues and has decided to deal with them comprehensively, but without provision of such a cause of action. *See, e.g,* 10 U.S.C. §§ 892, 893, 928; 18 U.S.C. § 2340A.

In the absence of such congressional action, however, courts should not imply a *Bivens* cause of action. *See Malesko*, 534 U.S. at 67 & n.3 (stating the Supreme Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Chilicky*, 487 U.S. at 423. This is especially true here, where creating such a remedy would involve courts in litigation over interrogations, living conditions, and treatment of detainees at overseas military detention facilities. Detainees could subject military officials to the full range of suits brought by civilian prisoners in the United States, requiring the judiciary to pass judgment on the allocation of resources for overseas prison facilities, the command

structures for carrying out official policies, the reporting structures for ensuring compliance with those policies, and (as in this case) the validity of specific detention and interrogation practices.

Where, as here, there are special considerations or sensitivities raised by a particular context, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562; (*quoting Bush v. Lucas*, 462 U.S. 367, 389 (1983)). But in the absence of such legislation, courts should not extend private damage actions against federal officials in this context. *See Arar*, 585 F.3d at 581 ("if Congress wishes to create a remedy for individuals * * *, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded").

3. The district court held that extending a cause of action to this case would not interfere with the political branches' control over military matters in a war zone because the damages remedy sought here would not require the court "to govern the armed forces," and would not challenge "military control over core warmaking powers." App. 30. But the reluctance of the courts to permit *Bivens* actions in military

and national security contexts does not depend upon whether the court will "govern the armed forces." Instead, it is rooted in "the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683. The detention in a theater of active hostilities of individuals suspected of trading arms to the enemy is as much connected to the "core warmaking powers" as the detention of an enemy captured on the battlefield.

Plaintiffs' substantive due process claim is a direct challenge to alleged policies governing the detention and treatment of individuals held by the military in a war zone. This challenge "would enmesh the courts ineluctably in an assessment of the validity and rationale of [those] polic[ies] and [their] implementation in this particular case, matters that directly affect significant * * * national security concerns." *Arar*, 585 F.3d at 575. Thus, as noted above, courts have declined to create *Bivens* causes of action to challenge military detention policies. *See, e.g., Rasul*, 563 F.3d at 532 n.5; *Al-Zahrani ,* 684 F. Supp. 2d at 111-12; *In re Iraq*, 479 F. Supp. 2d at 94.

The district court also suggested that, while "[f]urther evidence may demonstrate that particular treatment methods or rationales for use" implicate military affairs, at this stage of the litigation the court is "not yet in a position to consider such evidence." App. 31. That reasoning merely illustrates why special factors preclude a *Bivens* action here. The district court contemplated that it would hear evidence and

then decide which detention practices are sufficiently related to military needs – and presumably which (in the court's judgment) are not. That is precisely the sort of judicial second-guessing the Supreme Court has held inappropriate. As the Court explained in *Stanley*, 483 U.S. at 682, "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters." Determining whether a particular case would disrupt military affairs "would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime." *Id*. at 682-83.

The district court also reasoned that plaintiffs' American citizenship justified rejection of the "special factors" argument, reasoning that U.S. citizenship defeats a special factors argument because it is relevant to "the scope of constitutional protections overseas." App. 31. That reasoning incorrectly conflates the potential merits of the constitutional claim with the separate question of whether special factors counsel hesitation in creating a *Bivens* cause of action. Special factors counseling hesitation "relate not to the merits of the particular remedy, but to the question of who

should decide whether such a remedy should be provided." *Sanchez-Espinoza*, 770 F.2d at 208 (quoting *Bush*, 462 U.S. at 380). Likewise, the question of immunity, which asks whether the plaintiff has alleged a constitutional violation and whether that violation was clearly established, is distinct from the special factors analysis. *See Stanley*, 483 U.S. at 684.

It may be that citizens detained abroad have certain constitutional rights that aliens detained abroad do not. But that does not negate the fact that a challenge to military detention policies in a war zone would enmesh the judiciary in military and national security matters, interfering with Executive functioning and legislative prerogatives, regardless of the detainee's citizenship. That is why numerous courts have refused to create a *Bivens* cause of action for citizens in the context of military affairs and national security. *See, e.g., Stanley*, 483 U.S. at 683; *Chappell*, 462 U.S. at 304; *Benzman v. Whitman*, 523 F.3d 119, 123, 126 (2d Cir. 2008). The district court's rationale would create an anomalous situation in which identical challenges to the same military policy would yield different conclusions: the challenge brought by a U.S. citizen would not interfere with military and national security matters, but the same challenge to the same policy by a non-citizen would be precluded. But *both* challenges involve the same "congressionally uninvited intrusion into military affairs by the judiciary" that precludes a *Bivens* action. *Stanley*, 483 U.S. at 683.

II. FORMER SECRETARY RUMSFELD IS ENTITLED TO QUALIFIED IMMUNITY.

Because special factors clearly preclude a *Bivens* claim here, this Court need not address whether Secretary Rumsfeld is entitled to qualified immunity. As we discuss below, however, the district court erred in holding that qualified immunity does not protect Secretary Rumsfeld here.

A. The Qualified Immunity Doctrine.

Although the Supreme Court has recognized a cause of action for money damages against public officials in their individual capacities in certain limited situations, the Court at the same time has been acutely sensitive to "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974). Accordingly, government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent and those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).

The qualified immunity doctrine is not merely a defense to liability. It is intended to afford protection to federal officials from the entirety of the litigation process. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Personal liability lawsuits against government officials exact "substantial social costs," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814; *see also Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). To minimize those costs, the Court has thus repeatedly emphasized that an official's entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation and that "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. *Harlow*, 457 U.S. at 818; *Behrens*, 516 U.S. at 308.

Moreover, the qualified immunity doctrine is animated by important public policy concerns. The doctrine of qualified immunity is based upon the injustice "of subjecting to liability an officer who is required, by legal obligation, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 239-240; *see also Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845). A government official's immunity from suit is not "a badge or

emolument of exalted office," but rather is grounded on principles of public policy—"a policy designed to aid in the effective functioning of government." *Scheuer*, 416 U.S. at 242. Qualified immunity seeks to avoid, where appropriate, the "costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526. Judge Learned Hand explained that to deny such immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

The policies underlying qualified immunity are clearly implicated, and vigorous application of qualified immunity is particularly important, when actions are brought against Cabinet-rank officials. The "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," *Harlow*, 457 U.S. at 816, are amplified when the official's position includes the important responsibility of presiding over a federal agency. *See Iqbal*, 129 S. Ct. at 1946-47, 1948-49, 1952. The *Harlow* Court specifically observed that: "[e]ach such suit almost invariably results in these officials' and their colleagues' being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and

their intimate thought processes and communications at the presidential and cabinet levels. *Harlow*, 457 U.S. at 817 n.29 (internal quotations omitted).

A *Bivens* action can be maintained against supervisory officials only based on their direct personal involvement in alleged misconduct, *Alejo v. Heller*, 328 F.3d 930, 936 (7th Cir. 2003), and not on the basis of alleged negligent failure to prevent violations by their subordinates. *See Iqbal*, 129 S. Ct. at1949. Moreover, and of critical importance here, the qualified immunity inquiry includes the requirement of sufficiently pleading the personal involvement of the defendant and the manner in which the defendant is responsible for the alleged mistreatment. *Ibid*. We demonstrate below that the district court erred in denying Secretary Rumsfeld qualified immunity here because (1) the complaint does not allege his personal involvement in the alleged constitutional violation; and (2) the allegations of the complaint are vague and conclusory and do not sufficiently allege that Secretary Rumsfeld violated a clearly established constitutional right.

B. The Complaint Does Not Sufficiently Allege That Former Secretary Rumsfeld Was Personally Involved In The Alleged Constitutional Violation.

1. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court made clear that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires *more than labels and conclusions*, and a formulaic

recitation of the elements of a cause of action will not do" (emphasis added). "Factual allegations must be enough to raise a right to relief above the speculative level." *Ibid*. And a plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id*. at 555 n.3.

In *Iqbal*, the Court reaffirmed its previous decision in *Twombly* that a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim, because Fed. R. Civ. P. 8(a)(2) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). "'[N]aked assertion[s]'" of illegal conduct devoid of "'further factual enhancement'"do not suffice. *Ibid.* (quoting *Twombly*, 550 U.S. at 557). Instead, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ibid.* (quoting *Twombly*, 550 U.S. at 570).

Applying these principles in the context of a *Bivens* suit against government officials, the Court in *Iqbal* found that allegations that the former Attorney General and the former FBI Director had established and implemented policies that led to the detention of the plaintiff under harsh conditions, allegedly because of race, religion or national origin, were insufficient to state a claim. Specifically, the complaint in *Iqbal* alleged that the former Attorney General and FBI Director "knew of, condoned,

and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Iqbal*, 129 S. Ct. at 1951. It further alleged that former Attorney General Ashcroft was the "principal architect" of that alleged policy, and that Director Mueller was "instrumental" in adopting and executing it. *Ibid.*

The *Iqbal* Court concluded that those "bare assertions" were not entitled to the assumption of truth "because they amount[ed] to 'nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim * * *." *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 554-555). With respect to an allegation that the petitioners had established a policy of designating Muslim men as "high interest" detainees because of their race, religion, or national origin, the Court found that, even though they were not mere bare assertions, these allegations did "not plausibly establish" a discriminatory purpose in light of the "obvious alternative explanation" that a legitimate policy designed to investigate terrorist links would produce a disparate impact on Arab Muslims. *Id*. at 1951-52. The Court therefore concluded that the complaint had failed to "'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id*. at 1952 (quoting *Twombly*, 550 U.S. at 570).

The *Iqbal* Court also rejected the contention that allegations that high ranking officials had "knowledge and acquiescence in their subordinates' use of discriminatory criteria" are sufficient to state a claim. 129 S. Ct. at 1949. The Court held that "[r]espondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents," emphasizing that "[e]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid*.

2. The allegations of the complaint seeking to hold Secretary Rumsfeld personally responsible for plaintiffs' treatment at Camp Cropper do not survive scrutiny under *Twombly* and *Iqbal*. Plaintiffs contend that, while Secretary Rumsfeld was not personally involved in their treatment, he personally established "policies" that permitted the use of the harsh treatment they suffered. But the only concrete allegations of detention and interrogation policies in the complaint concern policies that by their terms did not apply to U.S. citizen detainees in Iraq, and in any event that were, by plaintiffs' own admission, rescinded *before* plaintiffs were detained. For instance, plaintiffs first cited a 2002 policy authorized by Secretary Rumsfeld concerning interrogation practices for alleged *enemy aliens at Guantanamo Bay.* App,. 118, ¶ 232. Not only is such a policy irrelevant to practices in Iraq, but the complaint acknowledges (*id*. ¶ 233) that the policy was rescinded in 2003, long

before plaintiffs were detained in 2006. Although plaintiffs also alleged that Secretary Rumsfeld sent Major General Geoffrey Miller to Iraq to "Gitmo-ize" Camp Cropper, App. 119, ¶¶ 236-37, they offered nothing to show that this general directive was to apply to U.S. citizens, that it pertained to the techniques they allege were used in their cases, or that it was still in effect at the time they were detained in 2006, even after Congress enacted the DTA in December 2005.

Plaintiffs also cite a policy approved by Secretary Rumsfeld in April 2003 (without stating whether it applied to Iraq), and a memorandum signed in September 2003 not by Rumsfeld, but by Lieutenant General Ricardo Sanchez. App. 119, ¶¶ 234-35, 238. But the complaint goes on to acknowledge (App. 121, ¶ 242-43) that those policies (to the extent they had not already been rescinded internally by the Department of Defense) were superseded by the Detainee Treatment Act in December 2005 – prior to plaintiffs' detention. The district court nevertheless erroneously cited them as evidence supporting Secretary Rumsfeld's personal involvement in their alleged treatment. App. 9-11.

Moreover, several of plaintiffs' allegations are unrelated to the specific practices that Secretary Rumsfeld is alleged to have authorized. For example, plaintiffs contend that their guards "constantly threatened" that they would use "excessive force" against them "if they did not immediately and correctly comply

with every instruction given them." App. 100, ¶ 158. Yet plaintiffs offered nothing to suggest that these alleged interactions with their guards were in any way related to a policy authorized by Secretary Rumsfeld. Similarly, although plaintiffs allege that they were denied adequate medical care, App. 99-100, ¶¶ 153-55, they do not allege that any of the policies purportedly issued by Secretary Rumsfeld addressed medical care at all, let alone instructed anyone to withhold medical care.

The only policy that plaintiffs alleged was actually in effect at the time of their detention rests upon allegations that are both speculative and implausible. As plaintiffs acknowledged, the DTA (enacted before plaintiffs' detention) limited interrogation techniques to those authorized in the Army Field Manual. Plaintiffs note that the Army Field Manual "at that time limited allowable techniques to those consistent with international norms," and do not allege that the Manual, or the techniques it authorizes, was in any way related to their alleged injuries. App. 121, ¶¶ 242-43.

Seeking to overcome the lack of any explicit policy in effect at the time of their detention that authorized their alleged treatment, plaintiffs allege that Secretary Rumsfeld "flout[ed] Congress," and that, on the same day Congress passed the DTA, Secretary Rumsfeld secretly "modified the Field Manual to include the cruel, inhuman and degrading techniques described above." App; 121. Plaintiffs assert that

Secretary Rumsfeld "added ten pages of classified interrogation techniques that apparently authorized, condoned, and directed the very sort of violations that Plaintiffs suffered." App. 121-22, ¶ 244. The complaint then alleges that "[t]o the best of Plaintiffs' knowledge, the December Field Manual was in operation during their detention."App. 122. This allegation, however, is based upon nothing more than speculation. Plaintiffs offer no credible factual basis for the theory that the Field Manual was secretly modified in any manner on December 30, 2005 (the DTA's date of passage) or even in "December 2005," *id*. ¶ 245, or that some portion of it is classified. To the contrary, the only update of the Field Manual since September 1992 was in September 2006, and no part of either of these versions is classified. Both the 1992 and 2006 Field Manuals are matters of public record.[2] Moreover, plaintiffs' claim is even less plausible in light of the fact that they provide no information regarding how they would have learned of this supposedly secret document (or of the techniques they speculate are authorized therein).

Nor can plaintiffs rescue their claim by relying upon their assertion that Secretary Rumsfeld had knowledge of alleged harsh treatment and failed to take corrective action. *See* App. 121, 126-27. The *Iqbal* Court expressly held that a claim

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[2] *See* www.loc.gov/rr/frd/Military_Law/pdf/intel_interrogation_sept-1992.pdf; http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

of "knowledge and acquiescence" is insufficient to impose supervisory liability. 129 S. Ct. at 1949.

Thus, plaintiffs' claim against Secretary Rumsfeld rests upon precisely the sort of "'naked assertion[s]' of illegal conduct" without any factual enhancement, that are insufficient to state a claim for personal liability against a government official. *Iqbal*, 129 S. Ct. at 1949. Simply asserting that a secret document exists is insufficient to "nudge" plaintiffs' claim "'across the line from conceivable to plausible.'" *Id*. at 1952 (quoting *Twombly,* 550 U.S. at 570).

C. The Allegations of the Complaint Are Too Vague and Conclusory To Support A Claim That Former Secretary Rumsfeld Violated Plaintiffs' Clearly Established Constitutional Rights.

In addition to their failure to adequately allege that Secretary Rumsfeld was personally involved in the practices that allegedly violated the Constitution, plaintiffs' vague and conclusory complaint does not sufficiently allege that Secretary Rumsfeld violated clearly established constitutional rights. Indeed, the absence of sufficient specificity prevents meaningful application of qualified immunity standards.

The usual first step in determining whether an official has qualified immunity is to inquire "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert* v. *Gilley*, 500 U.S. 226, 231 (1991). If the plaintiff has asserted a

constitutional violation, the inquiry focuses on the "objective legal reasonableness" of the defendants' conduct in light of clearly established law. *Harlow*, 457 U.S. at 818-19; *see Anderson*, 483 U.S. at 640. However, a court may bypass the threshold question of whether there was a constitutional violation and instead simply hold that the plaintiff has not alleged with sufficient specificity conduct that violated clearly established law at the time in question. *See Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009); *see Rasul*, 563 at F.3d at 530.

The discretion recognized in *Pearson* permits a court, where appropriate, to adhere to the general rule of constitutional avoidance – the rule that a court should not pass on questions of constitutionality, unless such adjudication is necessary. *Pearson*, 129 S. Ct at 821. Exercising that discretion is particularly appropriate where, as here with respect to plaintiffs' substantive due process claim, the constitutional question is "so fact-bound" that any decision this Court might render would "provide[] little guidance for future cases;" the nature and contours of the substantive due process right allegedly infringed are difficult to assess in context when set against the vague or conclusory allegations concerning the defendant's conduct; "the precise factual basis for the plaintiff's claim or claims may be hard to identify" because qualified immunity has been "asserted at the pleading stage," *id*. at

818-20; and the conditions and conduct alleged must be assessed in the unique context of military operations and military detention in a war zone.

Here, the law governing plaintiffs' claim requires the court to wade into the "murky waters of that most amorphous of constitutional doctrines, substantive due process." *Tun v. Whitticker*, 398 F.3d 899, 900 (7th Cir. 2005). That is particularly the case here, because plaintiffs' claim, if viable, would be governed by the "shocks the conscience" standard, *Rochin v. California*, 342 U.S. 165, 172 (1952). The qualified immunity inquiry in this context is especially fact-based, because the "shocks the conscience" standard involves "an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements." *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998); *see County of Sacramento v. Lewis*, 523 U.S. 833, 849-52 (1998). Plaintiffs generalized and conclusory allegations simply do not provide sufficient information about the alleged conduct for the court to perform the required analysis.

Much of the case law governing substantive due process in the context of detention conditions and interrogation involves domestic criminal law practices, not in the very different context of military detention in a war zone.[3] And, the potential

[3] Indeed, very few courts have even addressed precisely how constitutional rights apply to citizens outside the United States, let alone to individuals detained by American military forces in a war zone. *See Kar v. Rumsfeld*, 580 F. Supp. 2d 80

for disruption of military duties due to threat of personal liability lawsuits counsels against permitting vague and conclusory allegations to overcome qualified immunity in that context.

The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseaou v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). Thus, "'[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.'" *Ibid* (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)) (emphasis added). The present appeal therefore focuses on whether, in the specific context of this case, a reasonable official in Secretary Rumsfeld's position would know that the conduct he is alleged to have authorized violated the Constitution. *See Anderson*, 483 U.S. at 640.

Given the fact-bound nature of the inquiry, to overcome qualified immunity the complaint must establish that the facts alleged take the case beyond the "hazy border" between lawful and unlawful conduct, *Saucier*, 121 S. Ct. at 2151, into the realm of

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(D.D.C. 2008). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-70, 275 (1990); *Reid v. Covert*, 354 U.S. 1, 74) (1957) (Harlan, J., concurring); *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950); *Best v. United States*, 184 F.2d 131, 138 (1st Cir. 1950); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 270-71 (S.D.N.Y. 2000) (describing character of Fourth Amendment protection as applied to search of United States citizen in Kenya "unclear").

the "obvious case." *Brosseau*, 543 U.S. at 199; *see Anderson*, 483 U.S. at 640 (explaining that for a constitutional right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). Ordinarily, that showing requires the plaintiff to point to case law demonstrating that the contours of the right are clearly established in the particular context. *Boyd v. Owen*, 481 F.3d 520, 526 (7th Cir. 2007) (stating that to demonstrate a particular constitutional right is clearly established, a plaintiff must present case law that "has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand") (internal quotations and citation omitted); *Khuans v. Sch. Dist. 110*, 123 F.3d 1010, 1019-20 (7th Cir. 1997) (stating that to be clearly established, prior precedent "must dictate, that is, truly compel the conclusion," that, at the time the defendant acted, his alleged conduct in the particular situation before him violated the law) (internal quotations, citation, and alteration omitted).

We do not argue that well-pled, factually-supported and concrete allegations of, for instance, persistent exposure to extreme cold, sustained failure to supply food and water, sustained sleep deprivation, and the failure to furnish essential medical care, if of sufficient severity and duration, would not state a violation of substantive due process in the context of military detention in a war zone. Here, however,

plaintiffs have not sufficiently alleged the violation of a clearly established substantive due process right, and the qualified immunity inquiry requires an exacting analysis of the particular circumstances giving rise to the claim. *See Lewis*, 523 U.S. at 850. Despite the fact that plaintiffs amended their complaint twice, the complaint contains little more than vague, cursory, and conclusory references to plaintiffs' conditions of confinement, without sufficient factual information from which to evaluate their constitutional claim, let alone to conclude that a Cabinet-rank official violated their clearly established constitutional rights.

Plaintiffs alleged, for example, that their cells were extremely cold (App. 98, ¶ 147), but they provide no factual context, no elaboration, no comparisons, and no details, such as duration and whether they sought and were denied warmer clothing or blankets. *Cf. Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (suggesting that a low cell temperature at night may establish an Eighth Amendment violation only if combined with a failure to issue blankets). Similarly, plaintiffs alleged that "often" they were not given food and water "sometimes for an entire day," App. 99 [¶ 151], but offer no information on how frequently this occurred and under what circumstances, meaning they have not offered sufficient factual matter for a court to conclude that a clearly established constitutional right was violated. *See Iqbal*, 129 S. Ct. at 1949; *Cf. Reed v. McBride*, 178 F.3d 849, 853-54 (7th Cir. 1999) (finding that failure to

provide food is not a "per se objective violation of the Constitution" and that a court instead "must assess the amount and duration of the deprivation"). In the midst of a war zone, it would not be surprising for service disruptions to occur for any number of reasons, as plaintiffs' own allegations make clear. *Cf. Reed*, 178 F.3d at 854 (noting that Eighth Amendment denial-of-food claim depends in part on whether there are "extraordinary or extenuating circumstances"); *compare* App; 80 [¶ 40] (alleging that, "[a]s was true for everyone living in Baghdad, there were frequent disruptions in electricity and the water was not potable") *with* App. 99, ¶ 150 (complaining that cells at Camp Cropper "had no sinks nor any potable running water"). Although the details of plaintiffs' own confinement should be readily available to them and they have amended their complaint twice, plaintiffs stop short of alleging the sustained deprivation of food or water for prolonged periods, nor do they provide a factual basis for a plausible claim that there was some deliberate action designed to further an alleged policy intentionally instituted by Secretary Rumsfeld.

Plaintiffs also allege that "it was difficult to obtain meaningful rest" due to the conditions in their cells and that they were "purposefully deprived of sleep"; that their cells were "often" filled with intolerably loud music, and that guards would pound on the doors when they observed plaintiffs sleeping. App. 99, ¶ 149. Again, however, plaintiffs fail to provide any detail or context that would make it possible to determine

whether the actual conditions or conduct, as distinguished from the words they use to characterize it, shock the conscience. Despite taking advantage of two opportunities to amend their complaint, plaintiffs never bothered to specify, for instance, how often (and for how long) these alleged practices occurred. Given that lack of specificity, and given that it is plaintiffs' duty to plead such detail – especially in the foreign military setting and the murky constitutional context of substantive due process – and where the details of the conditions they claim to have experienced would be within their possession – there is no factual basis upon which to find the violation of a clearly established substantive due process right in this case. *See Lewis*, 523 U.S. at 850.[4]

In sum, plaintiffs' claim against Secretary Rumsfeld rests upon the sort of "'naked assertion[s]' of illegal conduct," without sufficient factual enhancement, that are insufficient to hold a government official personally liable for violating a clearly established constitutional right. *Iqbal*, 129 S. Ct. at 1949. This is particularly true with respect to the substantive due process right advanced by plaintiffs in this

[4] As we argued above (at 43-44, supra), plaintiffs offer nothing to tie their allegation that they were threatened with excessive force for not immediately and correctly complying with the guards' instructions to any policy issued by Secretary Rumsfeld. Similarly, while plaintiffs allege that they were denied adequate medical care, App. 99-100, they do not allege that any of the policies purportedly issued by Secretary Rumsfeld addressed medical care at all, let alone instructed anyone to withhold medical care.

case—*i.e.*, to not be exposed to certain conditions of confinement in the unique context of an overseas military detention in the particular context of this case. The Supreme Court and federal appellate courts have struggled, and continue to struggle, with the precise constitutional contours applicable to the detention of individuals—citizen and non-citizen alike—seized in a foreign war zone. *See, e.g., Munaf*, 128 S. Ct. 2207; *Boumediene*, 128 S. Ct. at 2246; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Thus, the complaint fails to adequately allege the violation of a clearly established constitutional right by Secretary Rumsfeld.

III. THE DISTRICT COURT ERRED IN REFUSING TO DISMISS THE ACTION AGAINST THE UNITED STATES UNDER THE "MILITARY AUTHORITY" EXCEPTION TO THE ADMINISTRATIVE PROCEDURE ACT.

It is "axiomatic that the plain language of a statute is the most reliable indicator of congressional intent." *Baker v. Runyon*, 114 F.3d 668, 670 (7th Cir. 1997). Indeed, because courts "presume that a legislature says in a statute what it means and means in a statute what it says there," when the language of a statute is unambiguous, "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In the present case, the plain language of the APA bars plaintiffs' claim against the United States. Plaintiffs are seeking review of an alleged decision by the Department of Defense refusing to return plaintiffs' property seized by the

military in a foreign war zone. The APA, however, explicitly excludes from judicial review acts of "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G).

Plaintiffs' complaint demonstrates that the plain and unambiguous language of the miliary authority exception precludes their APA claim. Plaintiffs APA claim clearly challenges the "exercise" of "military authority." The complaint alleges that plaintiffs were "rescued" from the SGS compound – in a war zone – by U.S. military personnel, who seized the disputed items at that time as part of an ongoing military investigation into the smuggling of arms to insurgents in Iraq. *See* App. 94, ¶ 127 (alleging that "military personnel seized all of Plaintiffs' personal property" during the "rescue"). Thus, plaintiffs themselves have acknowledged that the decision to confiscate their property in conjunction with their arrests was made by the military.

Nor can there be any doubt that the action underlying plaintiffs' claim took place "in time of war." Both before and after the seizure of plaintiffs' property, the U.S. military has been at war in Iraq. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *In re Iraq*, 479 F. Supp. 2d at 102-03 (taking judicial notice that United States is at war in Iraq and that hostilities are ongoing); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 283-84 (D. D.C. 2005) (recognizing that United States is at war in Iraq despite lack

of formal congressional declaration of war). And, the action occurred "in the field." Plaintiffs allege that the seizure of their property took place in the Red Zone in Baghdad, by soldiers assigned to "rescue" them.[5]

The district court reasoned (App. 45) that a claim for the *return* of property (as opposed to its seizure by military officers conducting a raid) it not inherently a challenge to the exercise of military authority in the field. However, the mere distinction between the seizure and return of property does not mean the case would not entail review of "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G). Plaintiffs here seek an inquiry into whether the military personnel properly seized the property and whether they lost, misplaced, or improperly transferred it. That would involve extensive discovery and judicial inquiry into military actions taken in a war zone during time of war – precisely the sort of inquiry the exception was designed to prevent.

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[5] Two district courts have held that the military authority exception precludes APA actions by detainees captured in Afghanistan and then transferred to Guantanamo Bay. *Rasul v. Bush*, 215 F. Supp.2d 55, 64 n. 11 (D.D.C.2002), *rev'd. on other grounds, Al Odah v. United States*, 103 Fed. Appx. 676 (D.C. Cir.2004); *In re Guantanamo Bay Detainee Cases*, 355 F. Supp.2d 443, 480-81 (D.D.C.2005), *vac. on other grounds, Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.2007), *rev'd, Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *see also Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir.2003) (Randolph, J., concurring), *rev'd. on other grounds, Rasul v. Bush*, 542 U.S. 466 (2004).

Simply stated, merely because a court is not adjudicating the *validity* of military authority does not mean that the court is not interfering with military authority. Under the district court's rationale, the court will not review the military's decision to arrest plaintiffs and confiscate their property. But the court's purported distinction between seizure and return means that the court must necessarily determine at what point the retention of property seized by the military during time of war changes from military to non-military action. The district court offered no principled basis for making this determination, nor did it explain how that determination can be made without inquiring into military decisionmaking during a time of war.

None of the cases cited by the district court support ignoring the clear language of the statute. The only case cited involving a claim for return of property, *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002), in fact turned on the circumstances of the seizure, and not the distinction between seizure and return. In *Rosner*, the district court held that the military authority exception did not apply because the alleged seizure of property took place after the war ended. As the court explained in that case, "[w]hile the Court defers to the political branches with respect to military matters, such deference does not extend to all actions which could arguably traced back to the exercise of military authority." *Id*. at 1212. Given the

timing of the seizure, the court concluded that the complaint in that case "makes specific allegations regarding conduct that, although exercised by military personnel, is decidedly non-military in nature." *Id*. at 1211-12. The plaintiffs had also averred that the actual seizure took place after the war had ended. *Id*. at 1212 n.14. The court clarified that it denied the motion to dismiss "out of an abundance of caution" to resolve the question whether the government's actions in seizing the property were non-military in nature. *Id*. at 1217-18.

The court also cited *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), a case that did not involve the seizure of property, let alone distinguish between seizure and return. The court in *Jaffee* held that the military authority exception did not bar an action brought by soldiers ordered to witness a 1953 atomic blast in Nevada. *Id*. at 719-20. The court held that, even if it could conclude that the action occurred in the field, and even if it could conclude that it occurred in time of war, the exception would not apply because the claim at issue turned upon the government's failure to notify the plaintiffs "in the years since" of their exposure to radiation, and not upon the military decision to order them to witness the blast. *Ibid*.

Even if *Jaffee* supports a general distinction between a claim based on an initial military action and a separate claim based on the government's failure to make amends for action that occurred 20 years earlier, that distinction does not help

plaintiffs here. Plaintiffs' claim in this case, unlike a claim for failure to warn of radiation exposure, would require an inquiry into the circumstances of the seizure, as plaintiffs themselves have admitted. *See* Plaintiff's Response to Motion to Dismiss at 13 n.9 ("If, as Plaintiffs alleged, the United States had no lawful justification for taking Plaintiffs' property in the first instance, then the United States is required to return that property after engaging in a thorough search to find it").

Indeed, reliance on the artificial distinction between the initial seizure of property and the failure to return it would swallow the military authority exception entirely. Virtually any plaintiff can carefully craft his pleadings to avoid challenging a direct military action, and instead insist that the challenge really pertains to the government's "decision" not to rectify the action. Permitting such an end run around section 701(b)(1)(G) would wholly undermine its purpose.

The district court's holding that the application of the exception requires additional factfinding is deeply flawed. First, the court is simply wrong when it says that "courts have recognized that *any* inquiry into the application of the 'military authority' exception is necessarily 'fact intensive.'" App; 45 (emphasis supplied) (quoting *Rosner*, 231 F. Supp. 2d at 1218). In *Rosner*, the complaint contained credible allegations that the seizure of property was non-military in nature, thus creating a "fact-intensive inquiry" into that specific question. 231 F. Supp. 2d at

1217-18. That case in no way stands for the proposition that *any* case involving the military authority exception involves a fact-intensive inquiry.[6] Where, as here, the allegations of the complaint plainly challenge a military action taken in the field during wartime, no additional facts are necessary.

In addition, the district court relied upon unbridled speculation, suggesting that discovery might show "that Plaintiffs' property has been transferred to a non-military agency or is no longer in the field," in which case the military authority exception would not apply. App. 46. However, it is plaintiffs' burden to prove that the court has jurisdiction, and they cannot do so with conclusory or speculative assertions that the property might have been transferred. *Iqbal*, 129 S. Ct. at 1950-51. Moreover, as discussed above, the application of the military authority exception turns on the circumstances of the seizure and not upon speculation as to the location of the property. Indeed, under the district court's rationale, military officials would be

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[6] The district court's reliance on *Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003) is puzzling. That case involved a challenge to a directive issued by the Secretary of Defense to require troops in the United States to submit to anthrax vaccinations. The court rejected application of the military authority because "none of the plaintiffs are presently in the 'field' or in 'occupied territory," and because the order establishing the vaccination program "was given by the Secretary of Defense, not by commanders in the field." *Id*. at 129. There is no indication that the court found it necessary to engage in a "fact-intensive inquiry" with respect to these issues. Moreover, this case is clearly distinguishable on its fact. Here, the seizure of the property, by plaintiffs' admission, took place in a war zone and was made by military personnel.

required to commit resources and personnel to search for the property (or to provide a justification for the failure to return that property in light of military necessity), on the basis of little more than speculation. That is precisely the sort of activity the exception was designed to prevent. And the disruption is even more pronounced in a case such as this one, when military officials will have to divine the location of property seized in a war zone while the war remains ongoing.[7]

The complaint in this case quite clearly challenges military action taken in the field during time of war, and no amount of speculation will suffice to overcome the plain language of section 701(b)(1)(G).

[7] This fact is confirmed definitively by the United States' own voluntary efforts to find plaintiffs' property, which required military personnel stationed in Iraq to conduct an extensive search for plaintiffs' property (resulting in the return of Vance's laptop computer). App. 156-59.

CONCLUSION

For the foregoing reasons, the judgments of the district court denying the motions to dismiss filed by Secretary Rumsfeld and by the United States should be reversed.

Respectfully submitted,

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AUGUST 2010

BRIEF FORMAT CERTIFICATION

I hereby certify that the Brief for Appellant complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 13,856 words.

August 13, 2010
Date

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2010, I served the foregoing Brief for Appellant upon counsel of record by causing two copies to be mailed to:

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APPENDIX

STATEMENT CONCERNING REQUIRED APPENDIX MATERIALS

Pursuant to Cir. R. 30(d), I certify that all of the materials required by Cir. R. 30(a) and (b) are included in the Appendix. The materials required by Cir. R. 30(a) are attached to this brief, as required by that Rule. Other record documents are separately bound in Appellants' Appendix.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD VANCE and NATHAN ERTEL,	)	
Plaintiffs,	)	**No. 06 C 6964**
v.	)	**Wayne R. Andersen**
	)	**District Judge**
DONALD RUMSFELD, UNITED STATES OF AMERICA and UNIDENTIFIED AGENTS,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This case is before the court on defendant Donald Rumsfeld's motion to dismiss plaintiffs' second amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the motion to dismiss [135] is denied as to Count I and granted with respect to Counts II and III.

BACKGROUND

According to the complaint, plaintiffs Donald Vance ("Vance") and Nathan Ertel ("Ertel"), both American citizens, traveled to Iraq in the fall of 2005 to work for a private Iraqi security firm, Shield Group Security ("SGS"). In the course of their employment, plaintiffs allegedly observed payments made by SGS agents to certain Iraqi sheikhs. Plaintiffs also claim to have seen mass acquisitions of weapons by SGS and sales in increased quantities. Questioning the legality of these transactions, Vance claims to have contacted the FBI during a return visit to his hometown of Chicago to report what he had observed. Vance asserts that he was put in contact with Travis Carlisle, a Chicago FBI agent, who arranged for Vance to continue to report suspicious activity at the SGS

compound after his return to Iraq. Vance alleges that he complied with Carlisle's request and continued to report to him daily. Several weeks later, Vance claims Carlisle put him in contact with Maya Dietz, a United States government official working in Iraq. Dietz allegedly requested that Vance copy computer documents and forward them to her. Vance contends that he complied with that request.

Plaintiff Ertel claims to have been aware of Vance's communications with the FBI and alleges to have contributed information to those communications. Ertel asserts that both he and Vance communicated their concerns about SGS to Deborah Nagel and Douglas Treadwell, two other United States government officials working in Iraq.

Plaintiffs contend suspicions within SGS grew as to Vance and Ertel's loyalty to the company. On April 14, 2006, armed SGS agents allegedly confiscated plaintiffs' access cards which permitted them freedom of movement into the "Green Zone" and United States compounds. This action effectively trapped plaintiffs in the "Red Zone" and within the SGS compound. Plaintiffs claim to have contacted Nagel and Treadwell who instructed them to barricade themselves in a room in the SGS compound until United States forces could come rescue them. Plaintiffs subsequently were successfully removed from the SGS compound by United States forces.

Plaintiffs allege that they then were taken by United States forces to the United States Embassy. Plaintiffs allege that military personnel seized all of their personal property, including their laptop computers, cellular phones, and cameras. At the Embassy, plaintiffs claim they were separated and then questioned by an FBI agent and two other persons from United States Air Force Intelligence. Plaintiffs contend that they disclosed all their knowledge of the SGS transactions and directed the officials to their

laptops in which most of the information had been documented. Plaintiffs also assert that they informed the officials of their contacts with Agent Carlisle in Chicago and Agents Nagel and Treadwell in Iraq. Following these interviews, plaintiffs claim they were escorted to a trailer to sleep for two to three hours.

Next, plaintiffs claim they were awakened by several armed guards who placed them under arrest and then handcuffed and blindfolded them and pushed them into a humvee. Plaintiffs contend that they were labeled as "security internees" affiliated with SGS, some of whose members were suspected of supplying weapons to insurgents. According to plaintiffs, that information alone was sufficient, under the policies enacted by Rumsfeld and others, for the indefinite, incommunicado detention of plaintiffs without due process or access to an attorney. Plaintiffs claim to have been taken to Camp Prosperity, a United States military compound in Baghdad. There they allege they were placed in a cage, strip searched, and fingerprinted. Plaintiffs assert that they were taken to separate cells and held in solitary confinement 24 hours per day.

After approximately two days, plaintiffs claim they were shackled, blindfolded, and placed in separate humvees which took them to Camp Cropper. Again, plaintiffs allege they were strip searched and placed in solitary confinement. During this detention, plaintiffs contend that they were interrogated repeatedly by military personnel who refused to identify themselves and used physically and mentally coercive tactics during questioning. All requests for an attorney allegedly were denied.

Plaintiffs allege that on or about April 20, 2006 they each received a letter from the Detainee Status Board indicating that a proceeding would be held on April 23, 2006 to determine their legal status as "enemy combatants," "security internees," or "innocent

civilians." The letters informed plaintiffs that they did not have a right to legal counsel at that proceeding. The letters also informed plaintiffs they only would be permitted to present evidence or witnesses for their defense if evidence or witnesses were reasonably available at Camp Cropper. Vance and Ertel allege that on April 22, 2006 they each received a notice stating that they were "security internees." The letters informed plaintiffs they had the right to appeal by submitting a written statement to camp officials. Both Vance and Ertel appealed, requesting each other as witnesses and their seized personal property as evidence.

Plaintiffs allege they were taken before the Detainee Status Board on April 26, 2006. Ertel and Vance claim they were not provided with the evidence they requested, nor were they permitted to testify on the other's behalf. Plaintiffs assert that they were not permitted to see the evidence against them or confront any adverse witnesses.

On May 17, 2006, Major General John Gardner authorized the release of Ertel, allegedly 18 days after the Detainee Status Board officially acknowledged that he was an innocent civilian. Vance's detention continued an additional two months, and he alleges that he continuously was interrogated throughout his detention. On July 20, 2006, allegedly several days after Major General Gardner authorized his release, Vance was permitted to leave Camp Cropper. Neither Vance nor Ertel was ever charged with any crime.

On December 18, 2006, plaintiffs initiated this lawsuit against defendants for the alleged constitutional violations that occurred in Iraq by the unidentified agents of the United States as well as for the practices and policies enacted by Rumsfeld who allegedly

authorized such actions by those agents. Rumsfeld has filed a motion to dismiss the claims against him.

STANDARD OF REVIEW

Rule 8 of the Federal Rules of Civil Procedure has long required that a plaintiff need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). At the motion to dismiss stage, the court must accept the material facts contained in a plaintiff's complaint as true and generally construe the complaint in a light favorable to the plaintiff. *See Jackson v. E.J. Branch Corp.*, 176 F.3d 971, 978 (7th Cir. 1999). In two recent decisions, however, *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the United Supreme Court made clear that Federal Rule 8 is not a license for wild conspiracies or baseless speculation.

In *Twombly*, the Supreme Court held that pleading a sufficient antitrust violation requires more than a mere allegation of parallel conduct. 550 U.S. at 556. Instead, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. The Seventh Circuit recently recognized that the lesson of *Twombly* is that "a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case." *Limestone Dev. Corp. v. Village of Lemont, Illinois*, 520 F.3d 797, 802-803 (7th Cir. 2008).

In *Iqbal*, the Supreme Court clarified that *Twombly* is not limited only to the antitrust context and set forth the general burden plaintiffs face on a motion to dismiss. *Iqbal*, 129 S. Ct. at 1953. In *Iqbal*, the plaintiff Javaid Iqbal was arrested as part of a

mass roundup of Muslim non-citizens in the period following September 11, 2001. *Id.* at 1951. He alleged that a policy of selectively detaining individuals based on race and religion improperly led to his arrest. *Id.* Iqbal named former Attorney General John Ashcroft and current Director of the Federal Bureau of Investigation Robert Mueller as defendants, arguing that each was an architect of the policy that permitted his detention. *Id.* Because these officials were named in the lawsuit, the Supreme Court was particularly concerned with ensuring that baseless or purely speculative allegations were properly dismissed. *Id.* at 1954. The Supreme Court recognized that it was "impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." *Id.*

Iqbal undoubtedly requires vigilance on our part to ensure that claims which do not state a plausible claim for relief are not allowed to occupy the time of high-ranking government officials. It is not, however, a categorical bar on claims against these officials. When a plaintiff presents well-pleaded factual allegations sufficient to raise a right to relief above a speculative level, that plaintiff is entitled to have his claim survive a motion to dismiss even if one of the defendants is a high-ranking government official.

ANALYSIS

I. Count I: Cruel and Inhumane Treatment Methods

In Count I, plaintiffs allege that they were subject to a number of cruel and degrading treatment methods during their respective periods of detention. Plaintiffs allege that the treatment methods included "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of

needed medical care, yelling, prolonged, solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques." SAC ¶ 259. We must determine whether it is plausible that Rumsfeld was personally involved in the decision to implement the class of harsh treatment methods that allegedly were utilized against plaintiffs Vance and Ertel.

A. Rumsfeld's Personal Involvement in Alleged Cruel Treatment

Plaintiffs bring their claim against Rumsfeld as a *Bivens* action. The United States Supreme Court in *Bivens v. Six Unknown Namaed Agents of Federal Bureau of Narcotics* established that victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of a statute conferring such a right. 403 U.S. 388, 396 (1999). In *Bivens*, the Supreme Court held that it is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). From its inception, *Bivens* has been based on "the deterrence of individual officers who commit unconstitutional acts." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71 (2001). Another purpose of extending a *Bivens* remedy to a person who has been subjected to the deprivation of constitutionally-guaranteed rights by an individual officer is to "provide a cause of action for a plaintiffs who lack any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *Id*. at 70.

Consistent with its purpose to "deter individual officers from committing constitutional violations," liability under *Bivens* is limited to those "directly responsible" for such violations. *Malesko*, 534 U.S. at 69-71. This requires a plaintiff to sufficiently

allege that a defendant was "personally involved in the deprivation of [his] constitutional rights." *Gossmeyer v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997). We will later evaluate Rumsfeld's claim that this court should not imply a *Bivens* remedy even if a constitutional violation is found to exist. First, however, we address the threshold question of whether Rumsfeld's personal involvement has been sufficiently alleged. Because of the factually intensive nature of plaintiffs' allegations of Rumsfeld's personal involvement, our evaluation of this issue is filtered through the lens of *Iqbal* to ensure that the facts alleged go beyond bare assertions or mere speculation.

According to plaintiffs' allegations in their second amended complaint, Rumsfeld was personally involved in their unconstitutional treatment by his decision to approve the adoption of harsh treatment methods that were utilized at Camp Cropper during plaintiffs' confinement. While plaintiffs acknowledge that Rumsfeld did not personally subject them to the harsh interrogation and confinement methods, plaintiffs rely on a number of Seventh Circuit cases to establish the proposition that individuals who issue an order to engage in unconstitutional conduct can themselves be held liable for that conduct. In other words, a superior officer may be considered personally involved in a constitutional violation when his subordinates carried out such a violation pursuant to his policy directive. *See e.g., Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 614-615 (7th Cir. 2002) ("Ms. Doyle and Mr. Konold allege that the DCFS Director and his deputy personally were responsible for creating the policies, practices, and customs that caused the constitutional deprivations. . . . [T]hese allegations . . . suffice at this stage in the litigation to demonstrate . . . personal involvement in the purported unconstitutional conduct."); *see also Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

Rumsfeld cites seemingly contrary language from the Sixth Circuit that appears quite favorable to his position. *See Nuclear Transp. & Storage, Inc v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) (holding that an individual capacity claim against a cabinet officer cannot proceed simply based upon allegations that a cabinet officer "acted to implement, approve, carry out, and otherwise facilitate alleged unlawful policies"). Upon further review, however, it appears that the Sixth Circuit's objection was to the quality of the pleading—which the Court of Appeals characterized as a "mere assertion"—rather than to the principle of policymaker liability generally. *Id.* Thus, plaintiffs' complaint against Rumsfeld at this stage can proceed only if it properly alleges that Rumsfeld created a policy that expressly authorized those under his command to carry out a constitutional violation. *See Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 859 (7th Cir. 1999).

In their second amended complaint, plaintiffs lay out a number of factual allegations in support of their claim that Rumsfeld personally crafted the policies responsible for their harsh treatment in Iraq. While the secretive, classified nature of many of the alleged policy decisions in this area makes precise identification of events more difficult, plaintiffs have identified a number of key dates and facts in support of their allegations. The following factual allegations are laid out in plaintiffs' second amended complaint.

First, plaintiffs allege that on December 2, 2002 "Rumsfeld personally approved a list of torturous interrogation techniques for use on detainees on Guantanamo." Second Amended Complaint ("SAC") ¶ 232. In defiance of established military rules and standards, plaintiffs allege that Rumsfeld added a number of methods to the Army Field

manual including, use of 20-hour interrogations, isolation for up to 30 days, and sensory deprivation. *Id.*

Plaintiffs allege that on January 15, 2003 Rumsfeld rescinded his formal authorization for those techniques. SAC ¶ 233. Plaintiffs allege that he instead authorized the Commander of the United States Southern Command to use these methods "if warranted and approved by Rumsfeld himself in individual cases." *Id.*

Around the same time, plaintiffs also allege that Rumsfeld convened a "Working Group" to evaluate the status of interrogation policy. SAC ¶ 234. Plaintiffs allege that in April 2003 Rumsfeld approved a new set of interrogation techniques, which included isolation for up to thirty days, dietary manipulation, and sleep deprivation and again provided that additional harsh techniques could be used with his approval. SAC ¶¶ 234-235.

Plaintiffs further allege that in August 2003 Rumsfeld sent Major Geoffrey Miller to Iraq to review the United States prison system. SAC ¶ 236. Plaintiffs claim that Rumsfeld informed Major Miller that his mission was to "gitmo-ize" Camp Cropper, a task that required recommendations on how to more effectively obtain actionable intelligence from detainees and "authorized Major Miller to apply in Iraq the techniques that Rumsfeld had approved for use at Guantanamo and elsewhere. At Rumsfeld's direction, Major Miller did just that." *Id.* at ¶¶ 236-237.

Plaintiffs allege that on September 14, 2003, in response to Major Miller's call for more aggressive interrogation policies in Iraq and as authorized by Rumsfeld, Lieutenant General Ricardo Sanchez, Commander of the Coalition Joint Task Force, "signed a

memorandum authorizing the use of 29 interrogation techniques which included yelling, loud music, light control, and sensory deprivation, amongst others." SAC ¶ 238.

Finally, plaintiffs allege that Rumsfeld, on the same day that Congress passed the Detainee Treatment Act, modified the Army Field Manual to include ten new interrogation techniques, including those allegedly used against plaintiffs. SAC ¶ 244. While plaintiffs acknowledge that these modifications to the Field Manual were subsequently repealed, it is their belief that this repeal did not occur until after their detention. *Id.*

Plaintiffs also assert a series of allegations regarding Rumsfeld's supposed knowledge of cruel and inhumane treatment of detainees in Iraq. *See generally* SAC ¶¶ 262-267. We do not agree that these allegations are sufficient to separately demonstrate personal involvement through deliberate indifference. These allegations, however, do give some support to the core assertion regarding Rumsfeld's role as the architect of the detainee treatment methods at issue in this case.

First, plaintiffs allege that in May 2003, the Red Cross began sending detailed reports that detainees within United States custody in Iraq were being mistreated. SAC ¶¶ 240-241. According to plaintiffs, Colin Powell, then the Secretary of State, confirmed that Rumsfeld knew of the various reports and regularly apprised the President of their content. *Id.* Second, plaintiffs allege that Rumsfeld similarly was aware of a series of investigative reports into detainee abuse in Iraq, including those of former Secretary of Defense James Schlesinger, Army Major General Antonio Taguba, and Army Lieutenant General Anthony Jones. *Id.*

These allegations, if true, would substantiate plaintiffs' claim that Rumsfeld was aware of the direct impact that his newly approved treatment methods were having on detainees held in Iraq. In cases like this one in which much of the decision-making at issue took place behind closed doors, courts have shown a willingness to accept outside documentation of abuse as a factor supporting the plausibility of a plaintiff's allegations. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 976 (9th Cir. 2009) (holding that the "abuses occurring under the material witness statute after September 11, 2001 were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities, which could have given Ashcroft sufficient notice to require affirmative acts to supervise and correct the actions of his subordinates").

Based on these allegations, we conclude that plaintiffs have alleged sufficient facts to survive Rumsfeld's motion to dismiss on account of a lack of personal involvement. Two federal courts forced to address similar issues share our conclusion. In *al-Kidd v. Ashcroft,* the Ninth Circuit addressed a United States citizen who claimed that Attorney General Ashcroft and the Department of Justice ("DOJ") unlawfully used a material witness statute as a pretext to arrest and confine him based on suspicions that he was involved in terrorism-related activities. 580 F.3d at 951-952. Ashcroft argued that he was entitled to absolute prosecutorial immunity as to two of the claims asserted by al-Kidd and that he was entitled to qualified immunity on all three claims asserted by al-Kidd. *Id*. at 957. With respect to the plaintiff's core Fourth Amendment claim, the Ninth Circuit agreed with the district court that al-Kidd had met his burden of pleading a claim for relief that was plausible and that his lawsuit on the material witness claim should be

allowed to proceed and the district court properly denied Ashcroft's motion to dismiss. *Id.* at 951-952.

While acknowledging that *Iqbal* compels courts to carefully scrutinize a plaintiff's claim against high-ranking government officials, the Ninth Circuit nonetheless determined that the specific facts alleged by al-Kidd were sufficient to survive a motion to dismiss. *Id.* at 974-977. The Ninth Circuit relied on the detailed nature of the plaintiff's complaint, the existence of a number of public statements from Ashcroft and the DOJ regarding their use of the material witness statute, and evidence from the media that the statute had been abused to support its conclusion that the plaintiff's allegations were plausible. *Id.*

This was not a circumstance, however, in which the evidence was crystal clear in establishing the underlying merit of the plaintiff's claim. The Ninth Circuit acknowledged that if it were deciding a motion for summary judgment on the facts pled in the complaint, it's decision "might well be different." *Id.* at 977. Nonetheless, the Ninth Circuit recognized that the requirement of plausibility "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence." *Id.* at 976 (quoting *Twombly*, 550 U.S. at 556.) In light of this standard, the Ninth Circuit determined that al-Kidd had sufficiently stated a claim for relief. *Id.* at 977.

The second relevant post-*Iqbal* case is *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (2009). Jose Padilla, a United States citizen, was designated an enemy combatant as part of the "war on terror." *Id.* at 1012. Padilla alleges that he was imprisoned without charge, subject to extreme isolation from family and counsel, and interrogated under

threat of torture, deportation, or death. *Id.* at 1013-1014. The named defendant was John Yoo, a Deputy Attorney General in the Office of Legal Counsel and *de facto* head of war-on-terrorism legal issues under George W. Bush. *Id.* at 1014. Padilla alleged that Yoo was instrumental in designating him as an enemy combatant and in drafting the policy of employing harsh interrogation tactics against enemy combatants. *Id.* at 1014-1015.

To support these allegations, Padilla relied primarily on a host of memoranda written by Yoo that paved the way for the implementation of harsh interrogation methods. *Id.* at 1015-1016. The ten memoranda that were identified showed a pattern of statements from Yoo giving legal authorization for the use of these treatment methods. Based largely on these memoranda, the district court concluded that Padilla had alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights. *Id.* at 1034. The district court distinguished *Iqbal*, concluding that *Iqbal* rejected "bare assertions" that would only suffice if given an "assumption of truth." *Id.* In contrast, the district court recognized that Padilla alleged "with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla alleges were unlawful." *Id.* The district court denied Yoo's motion to dismiss.

Like the Ninth Circuit in *al-Kidd* and the district court in *Padilla*, we conclude that the allegations of Rumsfeld's personal involvement in unconstitutional activity are sufficiently detailed to raise the right to relief above the speculative level and would

survive a motion to dismiss. Therefore, we must next cconsider whether Rumsfeld is entitled to qualified immunity on plaintiffs' claims.

B. Qualified Immunity

Rumsfeld argues that he is entitled to qualified immunity on all claims, including Count I. The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). When established, qualified immunity operates as "*an immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (italics in original).

In *Saucier v. Katz*, the Supreme Court established a mandatory two-step sequence for resolving government officials' qualified immunity claims. 533 U.S. 194, 200-201 (2001). First, a court must determine whether the facts alleged show that the official's conduct violated a constitutional right. *Id.* Second, if the court concludes that a constitutional right was violated, then it must determine whether that right was clearly established at the time of the relevant events. *Id.* The Supreme Court in *Pearson v. Callahan* determined that the specific order of the qualified immunity inquiry is not required and held that "judges of the district court and courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the

qualified immunity analysis should be addressed in light of the circumstances in the particular case at hand." 129 S. Ct. at 818.

1. The Proscribed Treatment Methods Violated a Constitutional Right

It is clear that certain conduct may be deemed "so brutal and so offensive to human dignity" as to exceed the permissible limits of our Constitution. *Rochin v. California*, 342 U.S. 165, 174 (1952). When such conduct "shocks the conscience" of those belonging to a civilized system of justice, it can and should be deemed a violation of the Due Process Clause. *Id.* at 172-174. It is equally clear that the use of physical or mental torture on American citizens often will embody the paradigmatic example of "shocks the conscience" conduct. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause . . . ."); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental").

As early as 1878, the United States Supreme Court declared that it is "safe to affirm that punishments of torture . . . are forbidden by . . . the Constitution." *Wilkerson v. State of Utah*, 99 U.S. 130, 136 (1878). The existence of a strong constitutional right to be free from torture is highly important to our evaluation of whether a right to be free from Rumsfeld's alleged actions exists in this case. However, this general right alone does not resolve our qualified immunity inquiry. Instead, as Rumsfeld correctly points

out, we must undertake this inquiry "in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 202.

Rumsfeld is correct that questions remain regarding whether the alleged treatment plaintiffs received is properly classified as torture. For now, however, we believe that the allegations set forth by plaintiffs are comprehensive enough to merit an invocation of the line of cases assessing torture in a constitutional light. As we have previously discussed, plaintiffs allege that the treatment methods used against them included "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged, solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques." SAC ¶ 259. Accepting at this stage that these treatment methods were in fact used, we conclude that a court might plausibly determine that the conditions of confinement were torturous. *See Rhodes v. Chapman*, 452 U.S. 337, 362-63 (1991) (noting that, for the purposes of evaluating an alleged constitutional violation, courts may often evaluate the effect of conditions of confinement "in combination" to determine their validity); *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998) (holding that an "investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements").

Based on our assessment of the cumulative impact of the alleged practices, we feel comfortable distinguishing this case from the cases Rumsfeld cites in which the use of a single practice in isolation was insufficient to shock the conscience. Even if we were to agree with Rumsfeld that depriving plaintiffs of food and water or placing them in

extreme segregation alone passes constitutional muster, this would not change our conclusion that plaintiffs have set forth the cumulative allegations necessary to state a claim of mistreatment. While the evidence may ultimately show that neither the individual treatment methods nor their cumulative impact "shocks the conscience," that determination is not one we may properly make at this stage of the proceedings. *See Cole v. U.S. Capital, Inc.,* 389 F.3d 719, 724 (7th Cir. 2004) (noting that the proper task is to determine whether the plaintiff should be given a chance to offer evidence in support of their claims rather than whether they will ultimately prevail on the merits of those claims).

Additionally, plaintiffs correctly argue that this case is distinguishable from many in which detainee deprivation or suffering was upheld because the alleged injuries were unintentional or incidental. Indeed, the parties' briefs feature little dispute that, unlike many of these more traditional injurious actions, torturous treatment methods may manifest an inextricable aim to injure those subject to their use. In other words, these methods might at times themselves embody an intent to inflict harm. The importance of this factor is reflected in the Supreme Court statement that: "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property."

Lewis does not suggest that every practice aimed at inflicting injury will be deemed to shock the conscience absent a compelling governmental interest. Equally, it

does not rule out a "shock the conscience" finding in cases in which some governmental interest is present. Instead, *Lewis* makes clear that evidence regarding an intent to injure and an identifiable government interest may be relevant to evaluate a substantive due process claim.

Viewed as one factor among many in what amounts to a balancing of the justifications for the alleged behavior, it becomes clear that the scope of the government's interest in this case is not something we can or should fully assess at this stage. Such an inquiry would extend our role beyond that which is proper on a motion to dismiss. *See Cole*, 389 F.3d at 724. It also would force us to examine justifications proffered by Rumsfeld in a way that would lead us beyond the allegations contained in the pleadings. *See Clair v. Harris Trust and Savings Bank*, No. 96-7311, 1998 WL 246482, at *2 (N.D. Ill. 1998) ("In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings."). Thus, while it is quite possible that we may later determine that the justification for Rumsfeld's action was strong and/or the aim to injure embodied in the relevant treatment methods weak, this is not a determination that is properly made at this stage of the process in which no real evidence is before us. Plaintiffs have stated facts sufficient to warrant giving them an opportunity to provide such evidence in support of their claims.

At the conclusion of his brief on the constitutional right issue, Rumsfeld cites facially powerful Seventh Circuit authority for the proposition that even conduct deemed to be "abhorrent" does not give rise to a substantive due process claim. *See Tun v. Whitaker,* 398 F.3d 899, 900 (7th Cir. 2005) ("It is one thing to say that officials acted

badly, even tortiously, but—and this is the essential point—it is quite another to say that their actions rise to the level of a constitutional violation. We have declined to impose constitutional liability in a number of situations in which we find the officials' conduct abhorrent."). From this, Rumsfeld would have us conclude that the contours of a right to be free from allegedly torturous behavior are murky and amorphous at best.

As plaintiffs correctly point out, the specific substantive issue dealt with in *Tun* makes a meaningful application of that case to ours difficult to rationalize. *Tun* dealt with the six-week suspension of an Indiana high school student for possession of nude photographs. *Id.* at 900-901. The issue facing the court was whether the principal's decision to suspend the student gave rise to a substantive due process claim. *Id.* The Seventh Circuit concluded that no constitutional violation was present. *Id.* at 904. It was in this context, in which the court declined to create a new constitutional protection against the disciplinary decisions of a school principal, that the Seventh Circuit chose to note that a refusal to grant a constitutional remedy does not necessarily connote agreement with an official's behavior. *Id.* at 903. Rumsfeld certainly is correct that many questionable decisions by government officials do not give rise to a constitutional violation. He errs, however, in assuming that a reference made in the context of a high school suspension is dispositive of the allegations of mistreatment made here.

Finally, Rumsfeld argues that, because the alleged abuse occurred in Iraq during a period of war, the scope of constitutional protection available is drastically limited. This argument highlights many of the same issues we face in determining whether plaintiffs' constitutional rights were clearly established in the circumstances identified. Accordingly, we will address the scope of the constitutional protections available to

plaintiffs in the context of determining whether the constitutional rights were clearly established.

2. The Applicable Constitutional Right Was Clearly Established

In determining whether a constitutional right was clearly established, we must assess whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533. U.S. at 213. It is not necessary for the particular violation in question to have "previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Instead, a clearly established constitutional right exists in the absence of precedent, 'where the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Nanda v. Moss*, 412 F.3d 836, 844 (2005) (quoting *Anderson*, 483 U.S. at 640). Here, we must determine whether it would have been clear to a reasonable official in Rumsfeld's position that the application of the alleged treatment methods on American citizens was unconstitutional. Because we already have determined that the alleged treatment methods exceeded the scope of generally permissible practices, we now must determine if any of the circumstances at the time and place of plaintiffs' confinement eliminated the knowing availability of these constitutional limits.

First, the fact that the alleged events occurred in a foreign war zone rather than within the confines of the United States does not eliminate the entitlement of United States citizens to the protections of the U.S. Constitution. In *Kar v. Rumsfeld*, a district court faced the claim of a United States citizen who alleged a Fourth Amendment and procedural due process claim relating to his detention by U.S. military officials in Iraq. 580 F. Supp. 2d 80 (D.D.C. 2008). The court ultimately granted the government's

motion to dismiss these claims. *Id.* at 86. In the process, however, the court first addressed the argument that Kar was not entitled to the protections of the Fourth and Fifth Amendment because he was seized and detained in a foreign war zone. *Id.* at 83. Stating that this argument was "easily disposed of," the district court noted that "the Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq." *Id.* For support, the court relied on the oft-cited Supreme Court plurality opinion in *Reid v. Covert*:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

354 U.S. 1, 5-6 (1957) (plurality opinion). Also cited was the Second Circuit's conclusion that "[t]he Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed at United States citizens is well settled." *United States v. Toscanino*, 500 F.2d 267, 280 (2d. Cir. 1974)). Clearly, a plaintiff's citizenship often goes a long way in determining the scope of available constitutional protections.

In two recent cases, federal courts have entertained claims from plaintiffs asserting that they were subject to constitutional violations while detained outside United States territory. *See Rasul v. Myers*, 563 F.3d 527 (D.C. 2009); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007). In both cases, the court determined that the constitutional rights asserted were not clearly established. *Rasul*, 563 F.3d at 532; *In re Iraq*, 479 F. Supp. 2d at 108. In each case, the court drew a sharp distinction between citizens and non-citizens when determining what constitutional

rights were clearly established at the time of their injuries, and the plaintiffs' non-citizen status was the driving factor in the court's determination that no clearly established right was available. *Id.*

In *In re Iraq*, a group of Iraqi and Afghani citizens claimed that they had been tortured and abused by U.S. military officials at various locations in Iraq and Afghanistan. 479 F. Supp. 2d. at 88. The court determined that Rumsfeld and other high-ranking military officials were entitled to qualified immunity because they had not violated any clearly established right. *Id.* at 108-109. The court made clear that the plaintiffs' non-citizenship was the primary factor in reaching this conclusion: "[d]etermining whether the defendants' acts violated clearly established constitutional rights need not require extended explanation in this case because . . . Supreme Court precedent at the time the plaintiffs were injured established that the Fifth Amendment did not apply to nonresident aliens outside the sovereign territory of the United States . . . . [B]asic constitutional protections were unavailable to aliens abroad." *Id.* at 108-09.

In *Rasul*, the D.C. Circuit was asked to evaluate a series of constitutional claims from British nationals relating to their detention at Guantanamo Bay. 563 F.3d at 528. In concluding that Secretary Rumsfeld and ten other defendants were entitled to qualified immunity, the D.C. Circuit also relied on the plaintiffs' non-citizenship. *Id.* at 530-532. In addition to reiterating that limited constitutional protections were available to non-citizens abroad, the D.C. Circuit reaffirmed that American citizens are in fact entitled to such protections. *Id.* at 531. Discussing the Supreme Court's decision in *Verdugo-Urquidez,* 494 U.S. 259 (1990), the D.C. Circuit recognized that "[t]he majority noted that although American citizens abroad can invoke some constitutional protections . . .

aliens abroad are in an altogether different situations." *Rasul*, 563 F.3d at 531 (citing *Verdugo-Urquidez,* 494 U.S. at 270) (internal citations omitted).

These cases establish the importance of citizenship in circumstances in which federal agents outside the United States carry out constitutional violations. American citizens do not forfeit their core constitutional rights when they leave the United States, even when their destination is a foreign war zone. *See Kar*, 580 F. Supp. 2d at 83; *Toscanino*, 500 F.2d at 280. Given our previous determination that the right of American citizens to be free from torture is a well-established part of our constitutional fabric, we conclude that this right follows American citizens abroad.

Of course, our belief in the existence of such a generalized right does not conclude our inquiry. *See Saucier*, 533 U.S. at 201. This right must be evaluated in the context of the specific circumstances of each case. However, it is equally important that we not shirk from protecting against clear constitutional violations simply because the clear general right has not previously been enforced in the precise circumstances facing the court. *See Padilla*, 633 F. Supp. 2d at 1036 (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances") (other citations omitted). As the Supreme Court noted in *United States v. Lanier*, "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. 259, 271 (1997) (internal citations omitted).

Because at this stage we generally accept the allegations set forth in the complaint as true, the particularized question we face is whether it was clearly established to a

reasonable official in Rumsfeld's position that the application of torturous treatment methods against American civilians in Iraq might give rise to a constitutional violation. We are cognizant of the difficult circumstances that situated Rumsfeld's decision-making responsibilites. As Rumsfeld correctly points out, someone in his position of responsibility is "subject to an array of competing considerations." *See Benzman v. Whitman*, 523 F.3d 119, 128 (2008). Decisions by the Secretary of Defense in the context of an ongoing conflict are undoubtedly difficult ones that should not be called into question each time an alleged constitutional violation arises. However, it is equally true and important that American citizens must not be denied the opportunity to challenge genuine mistreatment at the hands of a government official simply because that official is tasked with difficult and extremely important decisions.

In *Lewis,* the Supreme Court recognizes that behavior is particularly prone to be shocking when it comes after decision-makers have had "time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." 523 U.S. at 853. We do not think Rumsfeld's job can be described as one uncomplicated by the pulls of competing obligations. We do, however, believe that there is merit to plaintiffs' assertion that Rumsfeld's position afforded him an opportunity to reflect on the material and constitutional consequences of his alleged actions. The thrust of the allegations against Rumsfeld personally is not that he had to make a split-second decision to use torture in a particular moment of unprecedented emergency. To the contrary, plaintiffs allege that Rumsfeld approved the use of torture for general purposes as an interrogation technique and did so with ample time to consider the consequences of his actions.

Our determination that American citizens have the right to offer evidence in support of a claim that they were subject to the type of treatment methods identified in this case does not reflect an attempt to second-guess the judgment of Rumsfeld or military officials. Instead, it represents a recognition that federal officials may not strip citizens of well-settled constitutional protections against mistreatment simply because they are located in a tumultuous foreign setting. Plaintiffs have set forth facts that if true could show a violation of a well-established constitutional right. As such, we believe it would be improper to deny them the ability to give evidentiary grounding for the allegations they have set forth.

C. Availability of a *Bivens* Remedy

A determination that plaintiffs have sufficiently alleged a constitutional violation does not conclude our inquiry regarding Count I. We still must answer another fundamental question regarding whether a federal remedy arises out of this violation. As discussed above, the Supreme Court established in *Bivens* that victims of a constitutional violation by a federal official may recover damages despite the absence of a statute conferring such a right. 403 U.S. at 396. However, in *Wilkie v. Robbins*, the Supreme Court made clear that *Bivens* does not provide an "automatic entitlement" to a remedy when a federal official has committed a constitutional violation. 551 U.S. 537, 550 (2007).

In determining whether plaintiffs should be provided a federal remedy for their injury, the Supreme Court determined that courts should employ a two step process. *Id.* First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing

a new and freestanding remedy in damages." *Id.* Second, "even in the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* (citing *Bush v. Lucas*, 462 U.S. 357, 378 (1983)); *see also Bivens*, 403 U.S. at 398 (holding that the right to such a cause of actions may be defeated if there are "special factors counseling hesitation in the absence of affirmative action by Congress). We analyze these questions in turn.

1. No Alternative Remedy Exists

Outside of a prospective *Bivens* action, there exists no remedy for plaintiffs' alleged injuries. As it was for the plaintiffs in *Bivens*, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Other than a brief discussion of the Detainee Treatment Act ("DTA") by each side, there appears little dispute regarding the absence of an alternative remedy. With respect to the DTA, we agree with Rumsfeld that the statute does not apply to the facts of this case and does not provide a remedy to vindicate a detainee's constitutional rights. There is no evidence in the record proffered by either party, and the court likewise has found none, that any alternative process exists to address the alleged constitutional deprivations suffered by plaintiffs in this case.

Historically, the absence of an alternative remedy has given strong support to the application of a *Bivens* remedy to an identifiable constitutional wrong. As the Supreme Court stated in *Davis v. Passman*, "unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, who at the same time have no effective means other than the judiciary to

enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." 442 U.S. 228, 242 (1979).

2. No Special Factors Counsel Hesitation

Because we have concluded there is no alternative forum for seeking a remedy, we must examine step two of the *Bivens* analysis, which requires us to determine whether thee are any "special factors counseling hesitation" and to weigh "reasons for and against the creation of a new cause of action, the way common law judges have always done." *Wilkie*, 551 U.S. at 554 (citing *Bush*, 462 U.S. at 378) . The bulk of special factors concerns raised by Rumsfeld deal with warmaking authority and judicial deference.

Before addressing these particularized concerns, however, we must address Rumsfeld's argument that the *Bivens* remedy has become generally disfavored amongst federal courts. According to Rumsfeld, since the Supreme Court created the *Bivens* remedy in 1971, it has consistently refused to extend *Bivens* to any new context or category of defendants. *See, e.g., Malesko*, 534 U.S. at 68. Rumsfeld correctly asserts that, in cases that have come before them since *Bivens*, the Supreme Court often has declined to extend a *Bivens* remedy to the particular constitutional violation it was addressing. *See*, *e.g. Wilkie,* 551 U.S. 537 (2007) (harassment of a landowner by federal officials in violation of the Fifth Amendment), *Schweiker v. Chilicky,* 487 U.S. 412 (1988) (wrongful denials of Social Security benefits), *Bush v. Lucas*, 462 U.S. 367 (1983) (First Amendment violations by federal employers). The Supreme Court, however, has not been steadfast in its reluctance to extend a judicial remedy. *See e.g., Davis v. Passman*, 442 US. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)*; Wilkie*, 551 U.S. at 550-551.

While the Supreme Court has been hesitant to apply *Bivens* in some of the particular circumstances brought before it, it can hardly be said to have adopted a steadfast rule against the application of *Bivens* constitutional remedies. More importantly, the Supreme Court's refusal to apply *Bivens* in particular constitutional contexts does not remove the availability of a *Bivens* remedy to federal courts tasked with adjudicating distinct constitutional violations. The frequency with which federal courts have been willing to apply *Bivens* to address a constitutional deprivation leaves us unwilling to decline such a remedy in this case based on Rumsfeld's assertion that *Bivens* is a generally disfavored vehicle for redress.

With respect to this case, Rumsfeld has identified three special factors: separation of powers; misuse of the courts as a weapon to interfere with the war effort; and other serious adverse consequences for national defense. Special factors counseling hesitation "relate not to the merits of the particular remedy, but to the questions of who should decide whether such a remedy should be provided." *Sanchaz-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 2004). According to this reasoning, "courts should avoid creating a new, nonstatutory remedy when doing so would be 'plainly inconsistent' with authority constitutionally reserved for the political branches." *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 103 (D. D.C. 2007 (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)).

We find two elements of Count I most important to our assessment of these special factors. First, Count I requires us only to determine whether the judiciary may properly provide a *post-hoc* remedy to American citizens who allege that, during a period of war, they were tortured. While plaintiffs' second amended complaint as a whole urges

a much broader wartime role for the judiciary—specifically, providing robust procedural requirements for detention, hearings, and access to courts—Count I asks at a more targeted level whether it is appropriate to provide enforceable limits on the treatment of American citizens.

It is well-settled that the "Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (citing *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs") and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war")). As Rumsfeld correctly argues, courts defer to the military for one primary reason: judges are not military leaders and have neither the expertise nor the mandate to govern the armed forces. *See Alhassen v. Hagee*, 424 F.3d 518, 525 (7th. Cir. 2005).

Count I, however, does not require this court to govern the armed forces. It equally does not require that we challenge the desirability of military control over core warmaking powers. The remedy requested does not implicate such powers. This conclusion follows an arc of reasoning quite similar to that employed in *Padilla*. Addressing analogous special factors concerns, the *Padilla* court considered "the possible constitutional trespass on a detained individual citizen's liberties where the detention was not a necessary removal from the battlefield." *Padilla,* 633 F. Supp. 2d at 1028. The

court was not "persuaded that such conduct implicated a core strategic warmaking power." *Id.* We reach a similar conclusion.

Future evidence may demonstrate that particular treatment methods or rationales for use that we have been asked to consider implicate military affairs in a more direct manner than has thus far been shown. At this stage, however, we are not yet in a position to consider such evidence. Based on the pleadings submitted and the backdrop of prior precedent, we are not convinced that dismissing the claim of these two American citizens is a proper exercise of judicial authority. Instead, we believe "a state of war is not a blank check" for the President or high-ranking government officials when it comes to the rights of the American citizens, and therefore, it does not infringe "on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 1027-1028 (citing *Hamdi*, 542 U.S. at 535).

The second element of Count I we find important to our special factors analysis is the American citizenship of plaintiffs Vance and Ertel. As the preceding discussion of *Hamdi* and *Padilla* illustrates, the existence of such citizenship has gone a long way for recent courts asked to assess the scope of constitutional protection overseas. In each case, the plaintiffs' American citizenship was a crucial factor in the decision to allow a suit to proceed. *See Hamdi*, 542 U.S. at 532 ("[I]t is . . . vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship."); *Padilla*, 633 F. Supp. 2d at 1020 (distinguishing scope of constitutional protections available to citizens and non-citizens abroad).

This view of the relevant case law is confirmed by the most recent primary case Rumsfeld invokes in support of his special factors argument. *See In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85. As we discussed in our qualified immunity analysis, the plaintiff's non-citizenship in *In re Iraq* was a crucial factor in that court's decision to grant the government's motion to dismiss. *See Padilla*, 633 F. Supp. 2d at 1025 (citing *In re Iraq*, 479 F. Supp. 2d at 103-105) ("The holding in *In re Iraq* demonstrates that the courts are not willing to extend a *Bivens* remedy to a non-citizen detained abroad who engages in acts of war against this country."). In reaching its decision, the district court in *In re Iraq* raised the specter of allowing "the very enemies [a field commander] is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 479 F. Supp. 2d at 105 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

More broadly, however, it is clear that the court's fears were directed at the prospect of a judicial remedy for non-citizens engaged in battle against the United States. *See In re Iraq*, 479 F. Supp. 2d at 105-106 (relying exclusively on precedent concerning "enemy aliens" to support the aversion to a judicial remedy against military officials). This is consistent with the general rationale underlying the court's reluctance to provide access to American courts in cases like these. *See, e.g. Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) ("[W]e think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.").

According to Rumsfeld, the Supreme Court's decision in *Munaf v. Geren* undermines the traditional force of American citizenship in cases like ours. 128 S. Ct. 2207 (2008). Faced with two American citizens who had been detained in Iraq, the Supreme Court did in fact conclude that habeas relief would be improper because it would result in "unwarranted judicial intrusion into the Executive's ability to conduct" both "military operations abroad" and the country's "international relations." *Id.* at 2218, 2224. The circumstances at issue in *Munaf*, however, are clearly distinct from ours. In *Munaf*, the citizen-detainees had been arrested by the Iraqi government for crimes allegedly committed within the confines of its sovereign territory. *Id.* at 2214. In denying habeas relief, the Supreme Court relied heavily on the principle that such relief cannot be used to defeat the criminal jurisdiction of a foreign sovereign. *Id.* at 2227-2228. A special interest in avoiding sensitive and direct foreign policy concerns, rather than a newfound hostility to the protections provided American citizens abroad, is what drove the Court's holding in *Munaf*. *Id.* at 2226. As such, we do not view *Munaf* as altering the principle that courts may provide a judicial remedy to American citizens abroad in circumstances in which such protection might not exist for a non-citizen.

Count I does not ask us to approve of a general expansion of judicial authority in matters of core military competence. When an American citizen sets out well-pled allegations of torturous behavior by executive officials abroad, we believe that courts are not foreclosed from denying a motion to dismiss such allegations at the very first stage of the trial process. "[T]he position that the courts must forgo any examination of the individual case . . . serves only to condense power into a single branch of government." *Hamdi*, 542 U.S. at 535-36. Because we do not believe that precedential or prudential

concerns counsel in favor of such a "blank check" for high-ranking government officials, we do not believe that any special factors counsel hesitation sufficient to foreclose a constitutional remedy for Vance and Ertel. *Id.* at 536. ["E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). Therefore, Rumsfeld's motion to dismiss Count I is denied.

II. Count II: Procedural Due Process

In Count II, plaintiffs allege that they were denied procedural due process during their confinement in Iraq. In particular, they allege that they were denied knowledge of the factual basis for their detention, access to exculpatory evidence, and an opportunity to appear before an impartial adjudicator. *See* SAC ¶¶ 58-62. Plaintiffs argue that the Supreme Court's decision in *Hamdi v. Rumsfeld* clearly establishes that the military cannot detain American citizens without affording them procedural due process, even in wartime. 542 U.S. at 532.

In *Hamdi*, the Supreme Court identified a set of core rights due to American citizen-detainees. 542 U.S. at 535. However, Rumsfeld argues that *Hamdi* is inapplicable because it addressed a domestic detention setting whereas the allegations in this case occur in the midst of a foreign war zone. We agree with Rumsfeld that Vance and Ertel must, at a minimum, demonstrate a violation of a *Hamdi* core right in order for their claim to proceed. If the procedures plaintiffs were afforded would have been acceptable in a domestic setting, we will not deem them insufficient in the context of a foreign status determination. *See Kar*, 580 F. Supp. 2d at 84-85 (holding that the interests considered in *Hamdi* "strike a different balance"—more deferential to the government—in a case in

which the detention occurred in the midst of a foreign war zone). Indeed, plaintiffs agree that the sufficiency of their claim depends on their ability to allege a violation of a core right recognized in *Hamdi*. This requires an allegation that, in part or in whole, plaintiffs were denied "notice of the factual basis of [their] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533.

First, plaintiffs assert that the status board letters they received were not sufficient to put them on notice of the factual basis for their detentions. We disagree. These letters informed each plaintiff why he was being detained:

> for being a suspect in supplying weapons and explosives to insurgent/criminal groups through your affiliation with the Shield Groups Security Company (SGS) operating in Iraq. Credible evidence suggests that certain members of SGS are supplying weapons to insurgent groups in Iraq. Further, you are suspected of illegal receipt of stolen weapons and arms in Iraq from Coalition Forces.

SAC Ex. A. Under *Hamdi*, we find that these letters did, in fact, provide sufficient notice. *Hamdi* does not require a detailed affidavit be provided to each detainee in a foreign war zone, it merely requires "notice of the factual basis." 542 U.S. at 533. Plaintiffs have given this court no reasoned means by which to reach a contrary conclusion. Moreover, our conclusion is confirmed by the holding of in *Kar*. The plaintiff in *Kar* was given a similar status letter that informed him that the military suspected him of "possess[ing] explosive materials." 580 F. Supp. 2d at 85. Referring to this as the "formal notice of his detention," the court held that Kar "did receive notice of the factual basis for his detention." *Id.*

Second, plaintiffs argue that they were denied a fair opportunity to rebut the government's factual assertions. They assert that they sought to call each other and a handful of government officials as witnesses and to retrieve the cell phones and laptops from which they had communicated with the FBI. It is unrealistic, and out of line with *Hamdi*'s requirements, however, to assume that a citizen-detainee hearing like the one here would require the government to replicate the full complement of evidentiary protections afforded in criminal trials. *See Hamdi*, 542 U.S. at 533-534.

Again the court's holding in *Kar* court confirms our conclusion. The plaintiff in *Kar* claimed that the military denied his requests that government witnesses, including "the FBI agents and military officers who interrogated him" be made available at his hearing. *Kar*, 580 F. Supp. 2d at 82. In declining to find a due process violation, the court said that "[t]he government's inability or unwillingness to summon certain military personnel as witnesses and its refusal to turn over reports that might divulge interrogation techniques were acceptable given the interests at stake." *Id.* at 86. We find no reasoned basis to conclude differently here.

Third, plaintiffs assert that the Detainee Status Board that conducted their hearings was not impartial, but rather, outcome driven. Plaintiffs allege that were it otherwise, the Board would have provided them the reasonably available evidence they requested. As we noted above, however, given the legitimate considerations that may lead to reduced evidentiary access in a foreign status hearing, plaintiffs' assertion provides no support for their allegation of impartiality. We also agree with Rumsfeld that, because the outcome of this hearing was the release of each plaintiff, nothing beyond speculation grounds the claim of impartiality.

Finally, plaintiffs have asserted an equal protection theory as part of their procedural due process claim. Plaintiffs claim that civilian Americans who are detained by the military get cut off from a host of due process protections that the military affords to its own. This theory cannot support a right to relief.

In an equal protection claim, a plaintiff must prove he was treated differently than someone similarly situated—someone "prima facie identical in all relevant respects." *Landry v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005). By plaintiffs' own admission, the only people who have received protections of the Uniform Code of Military Justice ("UCMJ") were military personnel. Because they were not military personnel at the time of their detentions, plaintiffs cannot satisfy the "similarly situated" requirement. Plaintiffs argument that the UCMJ is nonetheless relevant because it demonstrates the feasibility of providing due process protections is not an equal protection argument. Instead, it is simply an argument about the practicality of adding new protections for non-military officials. Because this argument is not sufficient to show a constitutional violation with respect to existing procedural due process rights, it does not provide a sufficient basis for plaintiffs' claims.

Plaintiffs have not alleged facts that go beyond a speculative level in support of a claimed violation of a constitutional right to procedural due process. Therefore, Rumsfeld's motion to dismiss Count II is granted.

III. Count III: Denial of Access to Courts

In Count III, their final claim, plaintiffs allege that they were denied access to the court to challenge their detention. *See* SAC ¶¶ 284-293. This claim is properly broken into two parts. First, plaintiffs allege that they were prevented from challenging torturous

conditions of confinement. Second, they allege that they were prohibited from challenging the basis of their detention in Iraq. We will address each argument in turn.

First, plaintiffs claim that they had a right of access to the court to seek relief against the use of torture against them. Plaintiffs do not identify an actual predicate claim by which we would properly assess this as part of our habeas inquiry. In other words, a claim regarding their inability to challenge alleged torturous conditions is distinct from an assessment of their habeas right to access to the court during confinement. *See*, *e.g.*, *Cochran v. Buss*, 381 F.3d 637, 639 (7th Cir. 2004) (holding that a state prisoner "challenging the fact or duration of his confinement must seek habeas corpus relief; a prisoner challenging a condition of his confinement, by contrast, must seek relief under 42 U.S.C. § 1983").

Insofar as plaintiffs assert a right of access to the court to challenge their conditions of confinement, we believe that their claim is properly articulated and assessed as part of Count I of their complaint. This is consistent with the Supreme Court's requirement that a "backward-looking denial-of-access claim [must] provide a remedy that could not be obtained on an existing claim." *Christopher v. Harbury*, 536 U.S. 403, 421 (2002). Because the only remedy plaintiffs can seek for this part of their denial of access claim is monetary damages, the same remedy they are seeking in Count I, plaintiffs may not "maintain the access claim as a substitute, backward-looking action." *Id.* at 422.

In the second part of Count III, plaintiffs assert a habeas claim regarding their inability to gain access to the courts for the purpose of challenging the grounds for their detention. This claim is addressed by the well-established principle that the Executive is

"entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition." *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008). We are not persuaded that six weeks and three months—the lengths of plaintiffs' respective detentions—were unreasonable amounts of time to make initial status determinations in Iraq. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (setting six months as a presumptively constitutional period for detention of non-citizens within the United States pending removal). In *Boumediene*, the Supreme Court's assessment of a reasonable period of time involved detainees who had been awaiting their status determinations for as long as six years. 128 S. Ct. at 2275. To sustain their claim, plaintiffs would need to establish that they possessed a "nonfrivolous, arguable" underlying claim that was frustrated by official acts impeding litigation of that claim. *See Harbury*, 536 U.S. at 415. Because existing precedent illustrates that plaintiffs would have not been able to seek habeas relief during their reasonably brief detentions in Iraq, they have failed to allege a predicate claim with even arguable legal merit. As such, Rumsfeld's motion to dismiss Count III is granted.

CONCLUSION

For the reasons set forth in the court's Memorandum Opinion and Order, defendant Donald Rumsfeld's motion to dismiss [135] is denied as to Court I and granted with respect to Counts II and III.

It is so ordered.

Wayne R. Andersen
United States District Court

Dated: March 5, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Donald Vance and Nathan Ertel,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 06 C 6964**
	)	
Donald Rumsfeld, United States of America and Unidentified Agents,	)	**Wayne R. Andersen District Judge**
	)	
Defendants.	)	

MEMORANDUM, OPINION AND ORDER

This case is before the Court on the motion of Defendant United States of America to dismiss Count XIV of Plaintiffs' Second Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Also before the Court are the United States' objections to Magistrate Judge Keys' order. For the following reasons, the motion to dismiss and the objections to Magistrate Judge Keys order are denied.

BACKGROUND

According to the Second Amended Complaint, Plaintiffs Donald Vance and Nathan Ertel, both American citizens, traveled to Iraq in the fall of 2005 to work for a private Iraqi security firm, Shield Group Security ("SGS"). In the course of their employment, Plaintiffs allegedly observed payments made by SGS agents to certain Iraqi sheikhs. They also claim to have seen mass acquisitions of weapons by the company and sales in increased quantities. Questioning the legality of these transactions, Vance claims to have contacted the FBI during a return visit to his native town of Chicago to report what he had observed. Vance asserts that he was put in contact with Travis Carlisle, a Chicago FBI agent, who arranged for Vance to

continue to report suspicious activity at the SGS compound after his return to Iraq. Vance alleges to have complied with Carlisle's request and continued to report to him daily. Several weeks later, Vance claims Carlisle put him in contact with Maya Dietz, a United States government official working in Iraq. Dietz allegedly requested that Vance copy SGS's computer documents and forward them to her. Vance contends that he complied with that request.

Plaintiff Ertel claims to have been aware of Vance's communications with the FBI and alleges to have contributed information to that end. Ertel asserts that both he and Vance communicated their concerns with SGS to Deborah Nagel and Douglas Treadwell, two other government officials working in Iraq.

Plaintiffs contend that SGS became suspicious about Vance and Ertel's loyalty to the firm. On April 14, 2006, armed SGS agents allegedly confiscated plaintiffs' access cards which permitted them freedom of movement into the "Green Zone" and other United States compounds. This action effectively trapped plaintiffs in the "Red Zone" and within the SGS compound. Plaintiffs claim to have contacted Nagel and Treadwell who instructed them to barricade themselves in a room in the SGS compound until United States forces could come rescue them. Plaintiffs were later successfully removed from the SGS compound by United States forces.

Plaintiffs were then taken to the United States Embassy. Military personnel allegedly seized all of plaintiffs' personal property, including their laptop computers, cellular phones, and cameras. At the Embassy, Plaintiffs claim they were separated and then questioned by an FBI agent and two other persons from United States Air Force Intelligence. Plaintiffs contend that they disclosed all their knowledge of the transactions of SGS and directed the officials to their laptops where most of the information had been documented. Plaintiffs also assert that they

informed the officials of their contacts with agent Carlisle in Chicago, and agents Nagel and Treadwell in Iraq. Following these interviews, Plaintiffs claim they were escorted to a trailer to sleep for two to three hours.

Plaintiffs allege that they were awoken by several armed guards who then placed them under arrest, handcuffing and blindfolding Vance and Ertel and pushing them into a humvee. Plaintiffs contend that they were labeled as "security internees" affiliated with SGS, some of whose members were suspected of supplying weapons to insurgents. According to Plaintiffs, that information alone was sufficient, according to the policies enacted by defendant Rumsfeld and others, for the indefinite, incommunicado detention of Plaintiffs without due process or access to an attorney. Plaintiffs claim to have been taken to Camp Prosperity, a United States military compound in Baghdad. Plaintiffs allege that they were placed in a cage, strip searched, and fingerprinted. Plaintiffs assert that they were taken to separate cells and held in solitary confinement 24 hours per day.

After approximately two days, Plaintiffs claim they were shackled, blindfolded, and placed in separate humvees which took them to Camp Cropper. Again, Plaintiffs allegedly were strip searched and placed in solitary confinement. During this detention, Plaintiffs contend that they were interrogated repeatedly by military personnel who refused to identify themselves and used physically and mentally coercive tactics during questioning. All requests for an attorney allegedly were denied.

On or about April 20, 2006, Plaintiffs each received letters from the Detainee Status Board indicating that a proceeding would be held April 23rd to determine their legal status as "enemy combatants," "security internees," or "innocent civilians." The letter informed Plaintiffs they did not have a right to legal counsel at that proceeding. The letter also informed Plaintiffs

they would only be permitted to present evidence or witnesses for their defense if they were reasonably available at Camp Cropper. On April 22nd , Vance and Ertel allegedly each received a notice stating that they were "security internees." The letter informed Plaintiffs they had the right to appeal by submitting a written statement to camp officials. Both Vance and Ertel appealed, requesting each other as witnesses and their seized personal property as evidence.

On April 26, 2006, Plaintiffs allegedly were taken before the Detainee Status Board. Ertel and Vance claim they were not provided with the evidence requested, nor were they permitted to testify on the other person's behalf. Plaintiffs assert that they were not permitted to see the evidence against them or confront any adverse witnesses.

On May 17, 2006, Major General John Gardner authorized the release of Ertel, allegedly 18 days after the Board officially acknowledged that he was an innocent civilian. Vance's detention continued an additional two months, where he was continuously interrogated. On July 20, 2006, several days after Major General Gardner authorized his release, Vance was permitted to leave Camp Cropper. Neither Plaintiff was ever charged with any crime.

Plaintiffs initiated this lawsuit against Defendants for the alleged constitutional violations that occurred in Iraq by the unidentified agents of the United States as well as for the practices and policies enacted by Rumsfeld which allegedly authorized such actions by those agents. Count XIV of the Second Amended Complaint, the only claim brought directly against the United States, seeks to invoke the Administrative Procedure Act ("APA") to order the United States to return certain property that Plaintiffs allege was confiscated from them by military personnel when they were arrested and detained in Iraq.

DISCUSSION

In order to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1940 (2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct at 1940 (citing *Twombly*, 550 U.S. at 556). The complaint must be construed in a light favorable to the plaintiff and the court must accept all material facts alleged in the complaint as true. *Jackson v. E.J. Branch Corp.*, 176 F.3d 971, 978 (7th Cir. 1999). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of a cause of action, supported by mere conclusory statements do not suffice." *Iqbal*, 129 S.Ct at 1940 (citing *Twombly*, 550 U.S. at 555).

Additionally, a complaint must first describe the claim with sufficient detail as to "give the defendants fair notice of what the…claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, a complaint does not need to set forth all relevant facts or recite the law. Rather, all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see also Doherty v. City of Chicago*, 75 F.3d 318 (7th Cir. 1996).

I. The Record Does Not Support Applying the Military Authority Exception

The United States first argues that this Court lacks jurisdiction to order the return of Plaintiffs' property, a form of relief usually available under the APA. The United States supports its argument by relying upon 5 U.S.C. § 701(b)(1)(G), which it calls the "military authority exception." Specifically, although the APA allows for review of final agency actions, section 701(b)(1)(G) excepts military authority exercised in the filed during hostilities from the

definition of “agency action.” It states as follows: "(b) For the purpose of this chapter... (1) `agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include ... (G) military authority exercised in the field in time of war or in occupied territory." *Id.*

We do not believe that the language of the statute indicates an intent to exempt the military as a whole or exempt all wartime military activities unrelated to armed conflict. See *Doe v. Sullivan*, 938 F.2d 1370, 1381 (D.C. Cir. 1991) (finding that the "military authority" exception did not apply to suit challenging a regulation permitting DoD to use unapproved investigational drugs on service member stationed in Saudi Arabia during the Persian Gulf War). Accordingly, courts have recognized that any inquiry into the application of the "military authority" exception necessarily is "fact intensive." *See, e.g., Rosner v. United States*, 231 F. Supp. 2d 1201, 1218 (S. D. Fla. 2002). To that end, courts evaluate the nature of the alleged wrongful acts as well as the nature of the perpetrator in deciding whether the challenged action was taken by the military in the field and during wartime. *Id*.

Further, when such information is not available on the record before the court, many courts have denied a motion to dismiss pending discovery. *See Rosner v. United States*, No. 01-1859, 2002 WL 31954453, *2-3 (S.D. Fla. Nov. 26, 2002).

The United States first argues that the "in the field" requirement for the military exception applies because Plaintiffs' challenge is to the seizure of their property. However, it appears that Plaintiffs have not challenged the initial seizure of their property, but rather the United States' decision not to return it when asked to do so. Case law underscores the distinction between the initial seizure and the failure to return property. *See, e.g., Jaffee v. United States*, 592 F.2d 712, 720 (3rd Cir. 1979). Plaintiffs are contesting the United States' refusal to return their property years after it was seized; the decision not to return it now is not inherently an exercise of authority from the field of battle. Plaintiffs and the United States have submitted conflicting evidence about the allegedly seized property, its location, and its return. We believe that further discovery is needed to sort out the details.

Second, and relatedly, it is not clear (and there are no facts in the record) that a commander in the field is causing the refusal to return Plaintiffs' property, another fact-specific question that the courts have found to be determinative. For example, in *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 129 (D.D.C. 2003), the court found that the "military authority" exception did not apply where Defendant Rumsfeld (and not commanders in the field) ordered

military members in Afghanistan and Iraq to be vaccinated. There is no evidence in the record as to who has directed the failure to return the property.

Third, there is no evidence to suggest where Plaintiffs' property is and whether some or all of Plaintiffs' property is outside of the military's possession. As Judge Keys found, if discovery demonstrates that Plaintiffs' property has been transferred to a non-military agency or is no longer in the field, then the APA's "military authority" exception would not apply. *Vance v. Rumsfeld*, 2007 WL 455782, at *8.

In this case, Magistrate Judge Keys previously found that the record does not contain sufficient facts to demonstrate whether the military authority exception applies, and we agree with that decision. Accordingly, the United States' motion to dismiss on the basis of the military authority exception is denied at this time pending discovery on the matter. We affirm the discovery ruling made by Magistrate Judge Keys on this issue.

II. Plaintiffs' APA Claim is Not Mooted by the United States' Affidavit

The United States also argues that there is no jurisdiction over the Plaintiffs' APA claim because that claim is moot. We disagree.

The United States claims that it has returned all of Plaintiffs' property that can be found -- one item among many. To support its claim, the United States has attached the affidavit of Lt. Melson, which details the alleged search that the United States undertook after this Complaint was filed and the Evidence/Property Custody Documents ("Property Documents") that Plaintiffs received upon their release from Camp Cropper. However, we find that neither the affidavit nor the Property Documents render Plaintiffs' APA claim moot at this time.

Plaintiffs raise numerous valid points about the adequacy of the search performed by Lt. Melson. Plaintiffs also point out numerous discrepancies in the Property Documents. These distinctions pointed out by Plaintiffs raise some doubt as to the reliability of the United States' proofs, precluding reliance on them to demonstrate that this case is moot. We believe that discovery on these issues is necessary to resolve the discrepancies. Therefore, we find that Plaintiffs case is not moot at this point and that Plaintiffs should be given the opportunity for discovery on this matter to investigate further.

III. Plaintiffs Have Properly Pled Their APA Claim

Finally, the United States argues that Plaintiffs have not properly pled their APA claim. We disagree.

Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus. "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*.--- U.S. --- . 127 S. Ct. 2197, 2200 (2007) (per curiam) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. ---, 127 S. Ct. 1955. 1964 (2007)). There is no requirement of heightened pleading for an APA claim.

We find that Plaintiffs' Complaint properly pleads an APA claim. In their Second Amended Complaint, Plaintiffs spell out the manner in which their property was taken, the types of property they are seeking returned, their attempts to regain control over their property from the United States Army and the Department of Justice ("DOJ"), and the Army's and DOJ's refusal to return the same. .

Nonetheless, according to the United States, Plaintiffs have not alleged sufficient facts to show agency action in their Complaint. We disagree. "Agency action" is defined to include "the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In this case, Plaintiffs allege agency action in the form of the Army's ruling as well as the DOJ's failure to return Plaintiffs' property. Specifically, Plaintiffs alleged that they petitioned the Army for their property but the Army refused to return it. In addition, Plaintiffs allege that they have tried to secure the return of their property from the DOJ, but DOJ has stated that the government does not intend to return any of their property. These allegations are sufficient to put the United States on "notice" of what agency action Plaintiffs complain. Cf. *Khelashvili v. Dorchoff*, No. 07-2826.2007 WL 4293634, *3 (N.D. Ill. Dec. 6. 2007). Plaintiffs' allegations are clear.

Additionally, the United States argues that Plaintiffs' pleading is insufficient because it fails to articulate a discrete search that the Army should have performed. Of course, such detailed allegations are not required to be pled in Plaintiffs' Complaint. See *Bell Atlantic*, 127 S. Ct. At 1964 ("a complaint ... does not need detailed factual allegations"). To the contrary, requiring that level of detail is neither appropriate nor logical at this stage: Information regarding where the United States should have searched for Plaintiffs' property is uniquely within the control of the United States. *Cf. Bd of Trustees. Sheet Metal Workers' Nat. Pension Fund v. Illinois Range, Inc*.,186 F.R.D. 498, 504 (N.D. Ill. 1999) ("in that all of the information as to the transactions and the purpose behind them is in the hands of the Individual Defendants, it cannot be expected that Plaintiff could provide any additional information in its complaint."); *D 56. Inc. v. Berry's Inc*., No. 95-5992, 1996 WL 252557, at * 11 (N.D. Ill. May 10,

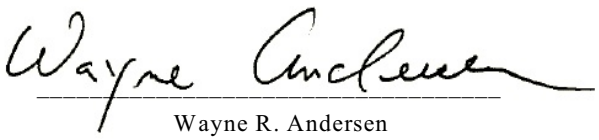
1996) (allegedly missing detail was "information which the plaintiff should not be required to know at this point, but rather something that defendants' answer and pre-trial discovery will hopefully reveal").

For these reasons, we find that Plaintiffs have properly their APA claim.

CONCLUSION

For the foregoing reasons, we deny the motion of the United States of America to dismiss [# 120]. The United States' objections to Magistrate Judge Keys' order are denied [# 94]

It is so ordered.



Wayne R. Andersen
United States District Court

Dated: July 29, 2009